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RATIFICATION OF DEFECTIVE CORPORATE ACTIONS

1

2§ 607.0145. Definitions.

3As used in ss. 607.0145-607.0152:

4(1) "Corporate action" means any action taken by or on behalf of
5the corporation, including any action taken by the incorporator,
6the board of directors, a committee of the board of directors, an
7officer or agent of the corporation or the shareholders.

8(2) "Date of the defective corporate action" means the date, or
9the approximate date, if the exact date is unknown, the defective
10corporate action was purported to have been taken.

11(3) "Defective corporate action" means:

12 (a) Any corporate action purportedly taken that is, and at
13 the time such corporate action was purportedly taken would
14 have been, within the power of the corporation, but is void
15 or voidable due to a failure of authorization, and

16 (b) An overissue.

17(4) "Failure of authorization" means the failure to authorize,
18approve or otherwise effect a corporate action in compliance with
19the provisions of this chapter, the articles of incorporation or
20bylaws, a corporate resolution or any plan or agreement to which
21the corporation is a party, if and to the extent such failure
22would render such corporate action void or voidable.

23(5) "Overissue" means the purported issuance of:

24 (a) Shares of a class or series in excess of the number of
25 shares of the class or series the corporation has the power
26 to issue under s. 607.0601 at the time of such issuance; or

27 (b) Shares of any class or series that is not then
28 authorized for issuance by the articles of incorporation.

29(6) "Putative shares" means the shares of any class or series,
30including shares issued upon exercise of rights, options,
31warrants or other securities convertible into shares of the
32corporation, or interests with respect to such shares, that were
33created or issued as a result of a defective corporate action,
34that (i) but for any failure of authorization would constitute

35valid shares, or (ii) cannot be determined by the board of
36directors to be valid shares.

37(7) "Valid shares" means the shares of any class or series that
38have been duly authorized and validly issued in accordance with
39this Act, including as a result of ratification or validation
40under ss. 607.0145-607.0152.

41(8) "Validation effective time" with respect to any defective
42corporate action ratified under ss. 607.0145-607.0152 means the
43later of:

44 (a) The time at which the ratification of the defective
45 corporate action is approved by the shareholders, or if
46 approval of shareholders is not required, the time at which
47 the notice required by s. 607.0149 becomes effective in
48 accordance with s. 607.0141; and

49 (b) The time at which any articles of validation filed in
50 accordance with s. 607.0151 become effective.

51The validation effective time will not be affected by the filing
52or pendency of a judicial proceeding under s. 607.0152 or
53otherwise, unless otherwise ordered by the court.

56MBCA Official Comment to s. 1.45

57The definitions of "corporate action," "defective corporate
58action" and "failure of authorization" are intentionally broad so
59as to permit ratification of any corporate action purportedly
60taken that would have been within the power granted to a
61corporation under the Act [ss. 607.0145-607.0152].

62The term "defective corporate action" includes an "overissue" of
63shares and other defects in share issuances that could cause
64shares to be treated as void. For purposes of determining which
65shares are overissued, only those shares issued in excess of the
66number of shares permitted to be issued under section 6.01 [s.
67607.0601] of the Act would be deemed overissued shares. If it
68cannot be determined from the records of the corporation which
69shares were issued before others, all shares included in an
70issuance that is or results in an overissue would be overissued
71shares.

74Florida commentary to s. 607.0145

75Virginia has the action to review these ratification activities
76taken by their equivalent of our Department of State instead of
77by their courts. While it is a good concept that would likely
78allow for more evenhanded determinations as to these matters, we
79suspect that the Florida Department of State would be unwilling
80to take on this role, so this may not work in Florida. However,
81if the Department is open to taking on such role, the
82Subcommittee should consider whether to take on this approach,
83and if the Department is unwilling or the Subcommittee thinks
84this is not a wise approach, the Subcommittee should consider
85whether to name a particular Florida circuit court to handle all
86of the matters under s. 607.0152 (such as the Circuit Court for
87Leon County, Florida). See further discussion in s. 607.0152.

89

90§ 607.0146 Defective Corporate Actions.

91 (1) ~~(1)~~—A defective corporate action will not be void or
92 voidable if ~~ratified~~:

93

94 (a) Ratified in accordance with the requirements of s.
95 607.0147, including the filing, if required, of Articles
96 of Validation under s. 607.0151, or ~~validated~~

97

98 (b) Validated in accordance with s. 607.0152.

99(2) Ratification under s. 607.0147 or validation under s.
100607.0152 shall not be deemed to be the exclusive means of
101ratifying or validating any defective corporate action, and the
102absence or failure of ratification in accordance with ss.
103607.0145-607.0152 will not, in and of itself, affect the validity
104or effectiveness of any corporate action properly ratified under
105common law or otherwise, nor will it create a presumption that
106any such corporate action is or was a defective corporate action
107or void or voidable.

108(3) In the case of an overissue, putative shares will be valid
109shares effective as of the date originally issued or purportedly
110issued upon:

111 (a) The effectiveness under ss. 607.0145-607.0152 and under
112 ss. 607.1001 - 607.1009 of an amendment to the articles of
113 incorporation authorizing, designating or creating such
114 shares; or

115 (b) The effectiveness of any other corporate action under
116 ss. 607.0145-607.0152 ratifying the authorization,
117 designation or creation of such shares.

120MBCA Official Comment to s. 1.46

121Subchapter E [ss. 607.0145-607.0152] provides a statutory
122ratification procedure for corporate actions that may not have
123been properly authorized and shares that may have been improperly
124issued. The statutory ratification procedure is designed to
125supplement common law ratification. Corporate actions ratified
126under this subchapter remain subject to equitable review.

127Examples of defective corporate actions subject to ratification
128include the failure of the incorporator to validly appoint an
129initial board of directors, corporate action taken in the absence
130of board resolutions authorizing the action, the failure to
131obtain the requisite shareholder approval of a corporate action,
132issuance of shares in the absence of evidence that consideration
133payable to the corporation for shares was received, the failure
134to comply with appraisal requirements and the issuance of shares
135without complying with preemptive rights. The ratification
136procedure is intended to be available only where there is
137objective evidence that a corporate action was defectively
138implemented. For example, subchapter E would permit ratification
139of shares previously issued but subsequently determined to have
140been issued improperly. It would not permit the corporation to
141issue shares retroactively as of an earlier date, however, where
142there is no objective evidence that those shares had previously
143been issued. Objective evidence may include resolutions, issuance
144of share certificates, subscription or share purchase agreements,
145entries in a share ledger or other correspondence indicating that
146shares were issued or intended to have been issued.

147Section 1.46(a) [s. 607.0146(1)] does not distinguish between
148void and voidable actions. Instead it provides that any defective
149corporate action that is ratified in accordance with section 1.47
150[s. 607.0147] or validated under section 1.52 [s. 607.0152] shall
151not be void or voidable. Section 1.47 [s. 607.0147] is not the
152exclusive means by which a defective corporate action may be
153ratified. Thus, the general common law doctrine of ratification,
154as applied to a board of directors' adoption of actions taken by
155officers who may not have had the actual authority to take such
156actions, continues to be an effective mode of ratification.
157Section 1.46(b) [s. 607.0146(2)] makes clear that the
158corporation's ratification of a defective corporate action that
159is voidable but not void using common law methods of ratification
160rather than under section 1.47 [s. 607.0147] will not, standing
161alone, affect the validity of the action or create a presumption

162that the action is not valid. In addition, ratification under
163subchapter E is distinct from correction of an already filed
164document under section 1.24 [s. 607.0124].

165Section 1.46(c) [s. 607.0146(3)] provides that an overissue can
166be remedied by the adoption of articles of amendment or other
167corporate action that has the effect of authorizing, designating
168or creating shares of a series or class, such that the putative
169shares that resulted in the overissue are deemed to be validly
170issued from the date of original issuance. This provision enables
171a corporation to cure an overissue occurring when shares have
172been duly authorized but are issued before articles of amendment
173are filed. It also permits a corporation to remedy an overissue
174even if it cannot specifically identify the putative shares.

176

177 **Florida Commentary to s. 607.0146**

178

179 Under subsection (1), effectiveness of the ratification of a
180 defective corporate action in accordance with the requirements of
181 s. 607.0147 requires compliance not only with that provision, but
182 also requires the filing of Articles of Validation if such filing
183 is required under s. 607.0151.

184

186

187§ 607.0147 Ratification of Defective Corporate Actions.

188(1) To ratify a defective corporate action under this section,
189other than the ratification of an election of the initial board
190of directors under subsection (2), the board of directors must
191take action ratifying the action in accordance with s. 607.0148,
192stating:

193 (a) The defective corporate action to be ratified and, if
194 the defective corporate action involved the issuance of
195 putative shares, the number and type of putative shares
196 purportedly issued;

197 (b) The date of the defective corporate action;

198 (c) The nature of the failure of authorization with respect
199 to the defective corporate action to be ratified; and

200 (d) That the board of directors approves the ratification of
201 the defective corporate action.

202(2) In the event that a defective corporate action to be
203ratified relates to the election of the initial board of
204directors of the corporation under s. 607.0205(1)(b), a majority
205of the persons who, at the time of the ratification, are
206exercising the powers of directors may take an action stating:

207 (a) The name of the person or persons who first took action
208 in the name of the corporation as the initial board of
209 directors of the corporation;

210 (b) The earlier of the date on which such persons first took
211 such action or were purported to have been elected as the
212 initial board of directors; and

213 (c) That the ratification of the election of such person or
214 persons as the initial board of directors is approved.

215(3) If any provision of this chapter, the articles of
216incorporation or bylaws, any corporate resolution or any plan or
217agreement to which the corporation is a party in effect at the
218time action under subsection (1) is taken requires shareholder
219approval or would have required shareholder approval at the date
220of the occurrence of the defective corporate action, the
221ratification of the defective corporate action approved in the
222action taken by the directors under subsection (1) must be

223submitted to the shareholders for approval in accordance with s.
224607.0148.

225(4) Unless otherwise provided in the action taken by the board
226of directors under subsection (1), after the action by the board
227of directors has been taken and, if required, approved by the
228shareholders, the board of directors may abandon the ratification
229at any time before the validation effective time without further
230action of the shareholders.

233MBCA Official Comment to s. 1.47

234The information required by section 1.47(a) (1) [s. 607.0147(1) (a)]
235regarding the listing of putative shares may be satisfied by
236attaching a table, including a capitalization table, listing the
237putative shares. Section 1.47(b) [s. 607.0147(2)] permits the
238ratification of the initial election of the board of directors by
239the persons who are acting as the current board of directors,
240recognizing that if the corporation's initial board of directors
241was defectively appointed, there may be no effective method of
242ratification because a duly elected board of directors does not
243exist.

245

246 Florida Commentary to s. 607.0147

249 § 607.0148 Action on Ratification.

250 (1) The quorum and voting requirements applicable to a ratifying
 251 action by the board of directors under s. 607.0147(1) will be the
 252 quorum and voting requirements applicable to the corporate action
 253 proposed to be ratified at the time such ratifying action is
 254 taken.

255 (2) (a) If the ratification of the defective corporate action
 256 requires approval by the shareholders under s. 607.0147(3), and
 257 if the approval is to be given at a meeting, the corporation must
 258 notify each holder of valid and putative shares, regardless of
 259 whether entitled to vote, as of the record date for notice of the
 260 meeting, and as of the date of the occurrence of the defective
 261 corporate action, provided that notice will not be required to be
 262 given to holders of valid or putative shares whose identities or
 263 addresses for notice cannot be determined from the records of the
 264 corporation. The notice must state that the purpose, or one of
 265 the purposes, of the meeting, is to consider ratification of a
 266 defective corporate action ~~and.~~

267 (b) If the defective corporate action is to be ratified by
 268 written consent, the corporation must notify each holder of valid
 269 and putative shares, regardless of whether entitled to vote, as
 270 of the record date for the action by written consent, and as of
 271 the date of the occurrence of the defective corporate action,
 272 provided that notice will not be required to be given to holders
 273 of valid or putative shares whose identities or addresses for
 274 notice cannot be determined from the records of the corporation.
 275 The notice must state that the purpose, or one of the purposes,
 276 of the written consent was to consider ratification of a
 277 defective corporate action.

278 (c) The notice must be accompanied by:

279 (a) Either a copy of the action taken by the board of
 280 directors in accordance with s. 607.0147(1) or the
 281 information required by ss. 607.0147(1) (a) through (1) (d),
 282 and

283 (b) A statement that any claim asserting that the
 284 ratification of such defective corporate action, and any
 285 putative shares issued as a result of such defective
 286 corporate action ~~shall,~~ should not be effective, or
 287 ~~shall~~ should only be effective on certain conditions, must

288 be brought, if at all, within 120 days from the applicable
289 validation effective time.

290(3) Except as provided in subsection (4) with respect to the
291voting requirements to ratify the election of a director, ~~the~~any
292quorum and the voting requirements applicable to the approval by
293the shareholders required by s. 607.0147(3) will be the quorum
294and voting requirements applicable, at the time of such
295shareholder approval, to the corporate action proposed to be
296~~ratified at the time of such shareholder approval.~~

297(4) The approval by shareholders at a meeting to ratify the
298election of a director requires that the votes cast within the
299voting group favoring such ratification exceed the votes cast
300opposing such ratification of the election at a meeting at which
301a quorum is present. The approval by shareholders by written
302consent to ratify the election of a director requires that the
303consents given within the voting group favoring such ratification
304represent a majority of the shares of the voting group.

305(5) Putative shares on the record date for determining the
306shareholders entitled to vote on any matter submitted to
307shareholders under s. 607.0147(3), and without giving effect to
308any ratification of putative shares that becomes effective as a
309result of such vote, will neither be entitled to vote nor counted
310for quorum purposes in any vote to approve the ratification of
311any defective corporate action. Putative shares on the record
312date for the action by written consent, and without giving effect
313to any ratification of putative shares that becomes effective as
314a result of such written consent, will not be entitled to be
315counted in any written consent to approve the ratification of any
316defective corporate action.

317(6) If the approval under this section of putative shares would
318result in an overissue, in addition to the approval required by
319s. 607.0147, approval of an amendment to the articles of
320incorporation under ss. 607.1001 - 607.1009 to increase the
321number of shares of an authorized class or series or to authorize
322the creation of a class or series of shares so there would be no
323overissue will also be required.

326MBCA Official Comment to s. 1.48

327Notwithstanding the shareholder notice required by section
3281.48(b) [s. 607.0148(2)], only valid shares are entitled to vote
329on the ratification action or counted for quorum purposes. The
330retroactive effect of a ratification of putative shares does not
| 331invalidate the quorum~~or~~, the voting result of the ratification.

332For matters other than the election of directors, the quorum and
333voting requirements applicable to shareholder approval of
334ratification are the quorum and voting requirements applicable to
335the corporate action being ratified at the time of such approval.
336For example, if the defective corporate action being ratified is
337an amendment to the articles of incorporation, whether in
338connection with an overissue or otherwise, the vote required
339would be governed by section 10.03 [s. 607.1003]. If the
340defective corporate action involves a merger, the vote required
341would be the vote required by section 11.04 [s. 607.1103].

343

344 **Florida Commentary to s. 607.0148**

345 ~~Issue 1 -- Notice of action -- should notice be given to all~~
346 ~~holders of shares, whether voting or non-voting, or only to~~
347 ~~holders of voting shares?~~

348 ~~Issue 2 -- We are concerned that the language in subsection (2)(b)~~
349 ~~is unclear. We need to discuss possible clarifications. The same~~
350 ~~issue exists under the language in s. 607.0149(2)(b). Shouldn't~~
351 ~~it reference s. 607.0152?~~

352 ~~Issue 3 -- There is no discussions of what happens if the~~
353 ~~shareholders were to ratify a defective action by way of written~~
354 ~~consent. Is it permitted? The Subcommittee needs to discuss~~
355 ~~whether we should try to build that into the shareholder approval~~
356 ~~provisions~~

357 Consistent with both Subchapter E of the MBCA and Section 204 of
358 the Delaware General Corporation Law, or DGCL, notice is required
359 to be provided to the holders of all shares, whether voting or
360 non-voting. Further, consistent with both Subchapter E of the
361 MBCA and Section 204 of the DGCL, notice of the meeting or notice
362 of the written consent, as the case may be, must be provided to
363 both current shareholders of the corporation and shareholders who
364 held shares as of the date of the occurrence of the defective
365 corporate action. However, notice is not required to be given to
366 persons who are no longer shareholders of the corporation at the
367 time that the corporation is seeking ratification of the
368 defective corporate acts but did not own their shares at the time
369 of the defective corporate action (i.e., those who first acquired
370 shares after the time of the defective corporate action, but
371 disposed of all their shares by the time the corporation is
372 seeking ratification of the defective corporate acts).

373 Subsection (2) requires notice to be given to shareholders
374 whether the defective act is to be ratified at a meeting or by
375 written consent. If the defective corporate action is to be
376 approved at a meeting, notice must be given to each person who is
377 a holder of valid and putative shares, regardless of whether
378 entitled to vote, as of the record date for notice of the
379 meeting, and each person who is a holder of valid and putative
380 shares, regardless of whether entitled to vote, as of the date of
381 the occurrence of the defective corporate action, and if the
382 defective corporate action is to be ratified by written consent,
383 the corporation must notify each person who is a holder of valid

384and putative shares, regardless of whether entitled to vote, as
385of the record date for the action by written consent, and each
386person who is a holder of valid and putative shares, regardless
387of whether entitled to vote, as of the date of the occurrence of
388the defective corporate action, In both cases, the information
389required to be provided is the same.

390The Subcommittee, after consulting with Delaware lawyers
391regarding DGCL ss. 204 and 205 and representatives of the
392Corporate Laws Committee of the Business Law Section of the
393American Bar Associations, believes that the failure of the
394corollary DGCL and MBCA provisions to address ratification by
395written consent in those statutes did not intend to eliminate the
396right to ratify a defective corporate act by written consent.

399§607.0149 Notice Requirements.

400(1) Unless shareholder approval is required under s.
401607.0147(3), [within 10 days after the action is taken/prompt]
402notice of an action taken by the board of directors under s.
403607.0147 must be given to each holder of valid and putative
404shares, regardless of whether entitled to vote, that is a holder
405of valid and putative shares as of:

406 (a) The date of the action by the board of directors taken
407 under s. 607.0147; and

408 (b) The date of the occurrence of the defective corporate
409 action being ratified;

410 provided that notice will not be required to be given to holders
411 of valid and putative shares whose identities or addresses for
412 notice cannot be determined from the records of the corporation.

413(2) The notice must contain:

414 (a) Either:

415 1. A copy of the action taken by the board of
416 directors in accordance with s 607.0147(1); or

417 2. The information required by ss. 607.0147(1)(a)
418 through (1)(d) or ss. 607.0147(2)(a) through (2)(c),
419 as applicable; and

420 (b) A statement that, in order to be considered, any claim
421 asserting that the ratification of the defective corporate
422 action and any putative shares issued as a result of such
423 defective corporate action should not be effective, or
424 should be effective only on certain conditions, must be
425 brought, if at all, within 120 days from the applicable
426 validation effective time.

427(3) No notice under this section is required with respect to any
428action required to be submitted to shareholders for approval
429under s. 607.0147(3) if notice is given in accordance with s.
430607.0148(2).

431(4) A notice required by this section may be given in any manner
432permitted by s. 607.0141 and, for any corporation subject to the
433reporting requirements of Section 13 or 15(d) of the Securities
434Exchange Act of 1934, may be given by means of a filing or

435furnishing of such notice with the United States Securities and
436Exchange Commission.

438

439 MBCA Official Comment to s. 1.49

440 No official comment.

441

442 Florida commentary to s. 607.0149

443 ~~Issue 1~~ The corollary MBCA provision contemplates ["prompt"]
444 notice to shareholders following the ratification of ~~the~~
445 corporate action by the Board of Directors. ~~We are recommending~~
446 ~~that~~ [This proposal requires the notice ~~should to~~ be ~~given~~ delivered
447 within ~~a specified number of~~ 10 days ~~following the ratification~~
448 ~~of~~ after the ~~defective corporate~~ action ~~by the Board of Directors~~
449 ~~under s. 607.0147(1) or (2). is taken]. However, unlike other
450 sections of the FBCA, this provision does not state that the
451 failure to provide the notice does not invalidate the action
452 taken.~~

453 ~~Issue 2~~ ~~The Model Act provision contemplates notice to each~~
454 ~~person who held shares at the time of the defective act (similar~~
455 ~~to the notice required prior to a shareholders' meeting to ratify~~
456 ~~a defective corporate action under s. 607.0148(2)). Should notice~~
457 ~~of the ratification be limited to current holders or should~~
458 ~~notice also go to persons who were shareholders at the time of~~
459 ~~the defective act, but have disposed of their shares prior to the~~
460 ~~ratification action taken by the board under s. 607.0147? What~~
461 ~~about persons who acquired their shares after the date of the~~
462 ~~defective act, but are no longer current shareholders?~~

464

465§ 607.0150 Effect of Ratification.

466From and after the validation effective time, and without regard
467to the 120-day period during which a claim may be brought under
468s. 607.0152:

469(1) Each defective corporate action ratified in accordance with
470s. 607.0147 will not be void or voidable as a result of the
471failure of authorization set forth and identified in the action
472taken under s. 607.0147(1) or (2) and will be deemed a valid
473corporate action effective as of the date of the defective
474corporate action;

475(2) The issuance of each putative share or fraction of a
476putative share purportedly issued pursuant to a defective
477corporate action identified in the action taken under s. 607.0147
478will not be void or voidable, and each such putative share or
479fraction of a putative share will be deemed to be an identical
480share or fraction of a valid share as of the time it was
481purportedly issued; and

482(3) Any corporate action taken subsequent to the defective
483corporate action ratified in accordance with ss. 607.0145 -
484607.0152 in reliance on such defective corporate action having
485been validly effected, and any subsequent defective corporate
486action resulting directly or indirectly from such original
487defective corporate action, will be valid as of the respective
488time such corporate action was taken.

490

491MBCA Official Comment to s. 1.50

492Ratification is effective as of the validation effective time and
493is not dependent on the expiration of the 120-day time period in
494which an action challenging the ratification must be brought. The
495ratification of a defective corporate action has the additional
496effect of ratifying corporate actions that are defective as a
497result of the original defective corporate action. For example,
498an overissue which results in subsequent director elections being
499invalid calls into question all actions by the invalidly elected
500board members. The ratification of the overissue, however, would
501cure any such additional defects.

503

504 **Florida commentary to s. 607.0150**

505 Under subsection (2), ratification means that the putative share,
506 or a fraction of a putative share, will be considered valid as of
507 the date on which the putative share or fraction of a putative
508 share was purportedly issued (as if it were issued back when it
509 was originally purportedly issued).

511

512 § 607.0151 Filings.

513 (1) If the defective corporate action ratified under ss.
514 607.0145 - 607.0152 would have required under any other section
515 of this chapter a filing in accordance with this chapter, ~~then,~~
516 ~~regardless of whether~~ and either:

517 (a) any previous filing requires any change to the filing to
518 give effect to the defective corporate act in accordance with
519 this section (including a change to the date and time of the
520 effectiveness of such filing); or

521 (b) a filing was not previously made filed in respect of
522 ~~such the~~ defective corporate ~~action and act,~~

523 then, in lieu of a filing otherwise required by this chapter, the
524 corporation must file articles of validation in accordance with
525 this section, and such articles of validation will serve to amend
526 or be a substitute for any other filing with respect to such
527 defective corporate action required by this chapter.

528 (2) The articles of validation must set forth:

529 (a) The defective corporate action that is the subject of
530 the articles of validation, including, in the case of any
531 defective corporate action involving the issuance of
532 putative shares, the number and type of putative shares
533 issued and the date or dates upon which such putative shares
534 were purported to have been issued¹;

535 (b) The date of the defective corporate action;

536 (c) The nature of the failure of authorization in respect
537 of the defective corporate action;

538 (d) A statement that the defective corporate action was
539 ratified in accordance with s. 607.0147, including the date
540 on which the board of directors ratified such defective
541 corporate action and the date, if any, on which the
542 shareholders approved the ratification of such defective
543 corporate action; and

544 (e) The information required by subsection (3).

¹ Proposed changes to DGCL s. 204 would eliminate the requirement that the articles of validation describe the putative shares being validated. This draft does not eliminate that requirement.

545(3) The articles of validation must also contain the following
546information:

547

548 ~~(a) If a filing was previously made in respect of the~~
549 ~~defective corporate action and no changes to such filing are~~
550 ~~required to give effect to the ratification of such~~
551 ~~defective corporate action in accordance with s. 607.0147,~~
552 ~~the articles of validation must set forth:~~

553 ~~1. The name, title and filing date of the filing~~
554 ~~previously made and any articles of correction to that~~
555 ~~filing; and~~

556 ~~2. A statement that a copy of the filing previously~~
557 ~~made, together with any articles of correction to that~~
558 ~~filing, is attached as an exhibit to the articles of~~
559 ~~validation;~~

560 ~~(b)~~ If a filing was previously made in respect of the
561 defective corporate action and such filing requires any
562 change to give effect to the ratification of such defective
563 corporate action in accordance with s. 607.0147, the
564 articles of validation must set forth:

565 1. The name, title and filing date of the filing
566 previously made and any articles of correction to that
567 filing;

568 2. A statement that a filing containing all of the
569 information required to be included under the
570 applicable section or sections of this chapter to give
571 effect to such defective corporate action is attached
572 as an exhibit to the articles of validation; and

573 3. The date and time that such filing is deemed to
574 have become effective; or

575 ~~(e)~~ If a filing was not previously made in
576 respect of the defective corporate action and the defective
577 corporate action ratified under s. 607.0147 would have
578 required a filing under any other section of this chapter,
579 the articles of validation must set forth:

580 1. A statement that a filing containing all of the
581 information required to be included under the
582 applicable section or sections of this chapter to give

583 effect to such defective corporate action is attached
584 as an exhibit to the articles of validation; and

585 2. The date and time that such filing is deemed to
586 have become effective.

588

589MBCA Official Comment to s. 1.51

590Section 1.51 [s. 607.0151] requires that in the event any filing
591is or would have been required under the Act to effect the
592defective corporate action, such filing (if no filing was
593previously made), such corrected filing (if correction to a
594previous filing is required), or such original filing (if no
595correction to a previous filing is required) be attached as an
596exhibit to the articles of validation.

597This is intended to provide a clear public record of the actions
598relating to the ratification.

600

601 **Florida commentary to s. 607.0151**

602 This proposal eliminates the required filing of Articles of
603 Validation if the previous filing made with the department does
604 not require changes for it to be accurate. The MBCA does not
605 eliminate that requirement. However, corollary changes to DGCL s.
606 204 have been proposed to eliminate that requirement, and the
607 Subcommittee believes that these changes should be included in
608 this statutory provision.

610

611§ 607.0152 Judicial proceedings regarding validity of corporate
612actions.

613(1) Subject to subsection (4) of this section, upon application
614by the corporation, any successor entity to the corporation, a
615director of the corporation, any shareholder, beneficial
616shareholder or unrestricted voting trust beneficial owner of the
617corporation, including any such shareholder, beneficial
618shareholder or unrestricted voting trust beneficial owner as of
619the date of the defective corporate action ratified under s.
620607.0147, or any other person claiming to be substantially and
621adversely affected by a ratification under s. 607.0147, the
622circuit court in the applicable county may:

623 (a) Determine the validity and effectiveness of any
624 corporate action or defective corporate action ratified
625 pursuant to s. 607.0147;

626 (b) Determine the validity and effectiveness of any
627 ratification of any defective corporate action under s.
628 607.0147;

629 (c) Determine the validity and effectiveness of any
630 defective corporate action not ratified or not ratified
631 effectively under s. 607.0147;

632 (d) Determine the validity of any putative shares; and

633 (e) Modify or waive any of the procedures specified in s
634 607.0147 or s. 607.0148 to ratify a defective corporate
635 action.

636(2) In connection with an action under this section, the court
637may make such findings or orders, and take into account any
638factors or considerations, regarding such matters as it deems
639proper under the circumstances. Factors that may be taken into
640account by the court in connection with an action under this
641section include those set forth in subsection (5) and a
642non-exclusive list of findings or orders that the court may take
643under this section is included in subsection (6).

644(3) Service of process of the application under subsection (1)
645on the corporation may be made in any manner provided by chapter
64648 for service on the corporation, and no other party need be
647joined in order for the court to adjudicate the matter. In an
648action filed by the corporation, the court may require notice of

649the action be provided to other persons specified by the court
650and permit such other persons to intervene in the action.

651(4) Notwithstanding any other provision of this section or
652otherwise under applicable law, any action asserting that the
653ratification of any defective corporate action, including any
654putative shares issued as a result of such defective corporate
655action, should not be effective, or should be effective only on
656certain conditions, must be brought, if at all, within 120 days
657of the validation effective time.

658(5) In connection with the resolution of matters pursuant to
659subsection (2), the court may consider the following:

660 (a) Whether the defective corporate act was originally
661 approved or effectuated with the belief that the approval or
662 effectuation was in compliance with the provisions of this
663 title, the articles of incorporation or the bylaws of the
664 corporation;

665 (b) Whether the corporation and board of directors has
666 treated the defective corporate act as a valid act or
667 transaction and whether any person has acted in reliance on
668 the public record that such defective corporate act was
669 valid;

670 (c) Whether any person will be or was harmed by the
671 ratification or validation of the defective corporate act,
672 excluding any harm that would have resulted if the defective
673 corporate act had been valid when approved or effectuated;

674 (d) Whether any person will be harmed by the failure to
675 ratify or validate the defective corporate act; and

676 (e) Any other factors or considerations the court deems just
677 and equitable.

678(6) In connection with an action under this section, the court
679may:

680 (a) Declare that a ratification in accordance with and
681 pursuant to s. 607.0146 is not effective or shall only be
682 effective at a time or upon conditions established by the
683 court;

684 (b) Validate and declare effective any defective corporate
685 act or putative stock and impose conditions upon such
686 validation by the court;

687 (c) Require measures to remedy or avoid harm to any person
688 substantially and adversely affected by a ratification
689 pursuant to s. 607.0146 or from any order of the court
690 pursuant to this section, excluding any harm that would have
691 resulted if the defective corporate act had been valid when
692 approved or effectuated;

693 (d) Order the department to accept an instrument for filing
694 with an effective time specified by the court, which
695 effective time may be prior or subsequent to the time of
696 such order, provided that the filing date of such instrument
697 shall be determined in accordance with s. 607.0123;

698 (e) Approve a stock ledger for the corporation that includes
699 any stock ratified or validated in accordance with this
700 section or s. 607.0146;

701 (f) Declare that shares of putative stock are shares of
702 valid stock or require a corporation to issue and deliver
703 shares of valid stock in place of any shares of putative
704 stock;

705 (g) Order that a meeting of holders of valid stock or
706 putative stock be held and exercise such powers that it
707 deems appropriate with respect to such a meeting;

708 (h) Declare that a defective corporate act validated by the
709 court shall be effective as of the time of the defective
710 corporate act or at such other time as the court shall
711 determine;

712 (i) Declare that putative stock validated by the court shall
713 be deemed to be an identical share or fraction of a share of
714 valid stock as of the time originally issued or purportedly
715 issued or at such other time as the court shall determine;
716 and

717 (10) Make such other orders regarding such matters as it
718 deems proper under the circumstances.

721

722MBCA Official Comment to s. 1.52

723Section 1.52 [s. 607.0152] confers plenary jurisdiction on a
724designated court to hear and determine claims regarding the
725validity of any corporate action or any shares, rights, options
726or warrants. The court's jurisdiction is not limited to reviewing
727corporate actions ratified or purportedly ratified under section
7281.47 [s. 607.0147], and includes the ability of a corporation or
729other permitted person to obtain a declaration regarding the
730validity of any corporate actions or shares that are potentially
731defective.

732In determining the validity of a corporate action or reviewing a
733corporate action ratified under section 1.47 [s. 607.0147], the
734court may consider any factors or considerations it deems proper
735under the circumstances. These might include whether the person
736originally taking the defective corporate action believed that
737the action complied with corporate requirements, whether the
738corporation and board of directors has treated the defective
739corporate action as a valid action, whether any person has acted
740in reliance on the public record that such defective corporate
741action was valid and whether any person will be or was harmed by
742the ratification of the defective corporate action or will be
743harmed by the failure to ratify or validate the defective
744corporate action.

746

747 Florida commentary to s. 607.0152

748 ~~Issue 1 -- Virginia has the action to review these ratification~~
749 ~~activities taken by their equivalent of our Department of State~~
750 ~~instead of by their courts. While it is a good concept that~~
751 ~~would likely allow for more evenhanded determinations as to these~~
752 ~~matters, we suspect that the Florida Department of State would be~~
753 ~~unwilling to take on this role, so this may not work in Florida.~~
754 ~~However, if the Department is open to taking on such role, the~~
755 ~~Subcommittee should consider whether to take on this approach,~~
756 ~~and if the Department is unwilling or the Subcommittee thinks~~
757 ~~this is not a wise approach, the Subcommittee should consider~~
758 ~~whether to name a particular Florida circuit court to handle all~~
759 ~~of the matters under s. 607.0152 (such as the Circuit Court for~~
760 ~~Leon County, Florida).~~

761 ~~Issue 2 -- Should a shareholder who no longer owns their shares at~~
762 ~~the time of the ratification have a right to challenge the~~
763 ~~ratification?~~

764 ~~Issue 3 --~~

765 Subsection 2 of s. 607.0152 provides that the court may make such
766 findings or orders, and take into account any factors or
767 considerations, regarding such matters as it deems proper under
768 the circumstances. DGCL Section 205 provides (i) an enumerated
769 list of the factors the court may wish to consider
770 (subsection (d)) and (ii) the remedies the Court court may wish to
771 grant (subsection (b)). ~~Should s. 607.0152 provide this type of~~
772 ~~guidance to Florida courts considering these issues? DGCL section~~
773 ~~205 follows:~~

774 ~~DGCL Section 205~~

775 ~~§ 205. Proceedings regarding validity of defective corporate acts~~
776 ~~and stock [For application of this section, see 80 Del. Laws, c.~~
777 ~~40, §16].~~

778 ~~(a) Subject~~ Consistent with the DGCL approach, this proposal
779 includes in the text of s. 607.0152 a list of factors a court may
780 wish to consider (in subsection (f5) of this section, upon
781 application by the corporation, any successor entity to the
782 corporation, any member of the board of directors, any record or
783 beneficial holder of valid stock or putative stock, any record or
784 beneficial holder of valid or putative stock as of the time of a
785 defective corporate act ratified pursuant to §204 of this title,
786 or any other person claiming to be substantially and adversely
787 affected by a ratification pursuant to §204 of this title, the
788 Court of Chancery may: ~~and the remedies a court may wish to grant~~
789 ~~(in subsection (6)). As noted in this section, there is a~~

790catch-all under both lists for any other factors or
791considerations the court deems just and equitable and for any
792such orders regarding such matters as the court deems proper
793under the circumstances. It is intended that the court shall have
794broad equitable powers in that regard.

795 ~~(1) Determine the validity and effectiveness of any~~
796 ~~defective corporate act ratified pursuant to §204 of this~~
797 ~~title;~~

798 ~~(2) Determine the validity and effectiveness of the~~
799 ~~ratification of any defective corporate act pursuant to~~
800 ~~§204 of this title;~~

801 ~~(3) Determine the validity and effectiveness of any~~
802 ~~defective corporate act not ratified or not ratified~~
803 ~~effectively pursuant to §204 of this title;~~

804 ~~(4) Determine the validity of any corporate act or~~
805 ~~transaction and any stock, rights or options to acquire~~
806 ~~stock; and~~

807 ~~(5) Modify or waive any of the procedures set forth in §204~~
808 ~~of this title to ratify a defective corporate act.~~

809 ~~(b) In connection with an action under this section, the Court~~
810 ~~of Chancery may:~~

811 ~~(1) Declare that a ratification in accordance with and~~
812 ~~pursuant to §204 of this title is not effective or shall~~
813 ~~only be effective at a time or upon conditions established~~
814 ~~by the Court;~~

815 ~~(2) Validate and declare effective any defective corporate~~
816 ~~act or putative stock and impose conditions upon such~~
817 ~~validation by the Court;~~

818 ~~(3) Require measures to remedy or avoid harm to any person~~
819 ~~substantially and adversely affected by a ratification~~
820 ~~pursuant to §204 of this title or from any order of the~~
821 ~~Court pursuant to this section, excluding any harm that~~
822 ~~would have resulted if the defective corporate act had been~~
823 ~~valid when approved or effectuated;~~

824 ~~(4) Order the Secretary of State to accept an instrument for~~
825 ~~filing with an effective time specified by the Court, which~~
826 ~~effective time may be prior or subsequent to the time of~~
827 ~~such order, provided that the filing date of such instrument~~
828 ~~shall be determined in accordance with §103(c)(3) of this~~
829 ~~title;~~

830 ~~(5) Approve a stock ledger for the corporation that includes~~
831 ~~any stock ratified or validated in accordance with this~~
832 ~~section or with §204 of this title;~~

833 ~~(6) Declare that shares of putative stock are shares of~~
834 ~~valid stock or require a corporation to issue and deliver~~

835 ~~shares of valid stock in place of any shares of putative~~
836 ~~stock;~~

837 ~~(7) Order that a meeting of holders of valid stock or~~
838 ~~putative stock be held and exercise the powers provided to~~
839 ~~the Court under §227 of this title with respect to such a~~
840 ~~meeting;~~

841 ~~(8) Declare that a defective corporate act validated by the~~
842 ~~Court shall be effective as of the time of the defective~~
843 ~~corporate act or at such other time as the Court shall~~
844 ~~determine;~~

845 ~~(9) Declare that putative stock validated by the Court shall~~
846 ~~be deemed to be an identical share or fraction of a share of~~
847 ~~valid stock as of the time originally issued or purportedly~~
848 ~~issued or at such other time as the Court shall determine;~~
849 ~~and~~

850 ~~(10) Make such other orders regarding such matters as it~~
851 ~~deems proper under the circumstances.~~

852 ~~(c) Service of the application under subsection (a) of this~~
853 ~~section upon the registered agent of the corporation shall be~~
854 ~~deemed to be service upon the corporation, and no other party~~
855 ~~need be joined in order for the Court of Chancery to~~
856 ~~adjudicate the matter. In an action filed by the corporation,~~
857 ~~the Court may require notice of the action be provided to~~
858 ~~other persons specified by the Court and permit such other~~
859 ~~persons to intervene in the action.~~

860 ~~(d) In connection with the resolution of matters pursuant to~~
861 ~~subsections (a) and (b) of this section, the Court of Chancery~~
862 ~~may consider the following:~~

863 ~~(1) Whether the defective corporate act was originally~~
864 ~~approved or effectuated with the belief that the approval or~~
865 ~~effectuation was in compliance with the provisions of this~~
866 ~~title, the certificate of incorporation or bylaws of the~~
867 ~~corporation;~~

868 ~~(2) Whether the corporation and board of directors has~~
869 ~~treated the defective corporate act as a valid act or~~
870 ~~transaction and whether any person has acted in reliance on~~
871 ~~the public record that such defective corporate act was~~
872 ~~valid;~~

873 ~~(3) Whether any person will be or was harmed by the~~
874 ~~ratification or validation of the defective corporate act,~~
875 ~~excluding any harm that would have resulted if the defective~~
876 ~~corporate act had been valid when approved or effectuated;~~

877 ~~(4) Whether any person will be harmed by the failure to~~
878 ~~ratify or validate the defective corporate act; and~~

879 ~~(5) Any other factors or considerations the Court deems just~~
880 ~~and equitable.~~

881 ~~(e) The Court of Chancery is hereby vested with exclusive~~
882 ~~jurisdiction to hear and determine all actions brought under~~
883 ~~this section.~~

884 ~~(f) Notwithstanding any other provision of this section, no~~
885 ~~action asserting:~~

886 ~~(1) That a defective corporate act or putative stock~~
887 ~~ratified in accordance with §204 of this title is void or~~
888 ~~voidable due to a failure of authorization identified in the~~
889 ~~resolution adopted in accordance with 204(b) of this title;~~
890 ~~or~~

891 ~~(2) That the Court of Chancery should declare in its~~
892 ~~discretion that a ratification in accordance with §204 of~~
893 ~~this title not be effective or be effective only on certain~~
894 ~~conditions,~~

895 ~~may be brought after the expiration of 120 days from the later~~
896 ~~of the validation effective time and the time notice, if any,~~
897 ~~that is required to be given pursuant to §204(g) of this~~
898 ~~title is given with respect to such ratification, except that~~
899 ~~this subsection shall not apply to an action asserting that a~~
900 ~~ratification was not accomplished in accordance with §204 of~~
901 ~~this title or to any person to whom notice of the ratification~~
902 ~~was required to have been given pursuant to §204(d) or (g) of~~
903 ~~this title, but to whom such notice was not given.~~

904

905

906 The Subcommittee believes that if litigation is filed challenging
907 a corporate action as defective, and an action is thereafter
908 taken by the corporation to ratify the defective corporate
909 action, the ratification will cure the potential technical
910 validity of the corporate act, but will not eliminate a claim in
911 the pending lawsuit that the defective action was inequitable to
912 the claimant or caused damages to the claimant.

913

914

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