

Attachment 1

White Paper

Chapter 607 White Paper

Summary of Ratification of Defective Corporate Actions Proposed Legislation

Background

In 2013, the Delaware General Assembly amended the Delaware General Corporation Law (the "DGCL") to include new sections 204 and 205 which provided mechanisms for a practical way for a corporation to resolve defective corporate acts (including overissuances of shares) and other uncertainties facing corporations "without disproportionately disruptive consequences." In 2016, the Corporate Laws Committee of the American Bar Association approved the addition of sections to the Model Business Corporation Act ("MBCA") addressing ratification of defective corporate actions, in substantial part based on the DGCL provisions.

Provisions addressing ratification of defective corporate actions, other than the ability to utilize articles of correction, provide corporations with two alternative statutory paths to validate or ratify corporate actions, including overissuances of shares, that, due to a defect in authorization, may have been void and incapable of ratification. The first path involves remedial action taken by the corporation itself, through actions by its board of directors and, if required, its shareholders. The second path involves a court proceeding that can be initiated by the corporation or certain other interested constituencies. The provisions addressing ratification of corporate defective actions have not to this point been enacted in Florida. In an effort to conform with a growing number of states that have followed the DGCL and MBCA and enacted laws regarding ratification of defective corporate actions, the Chapter 607 Drafting Subcommittee is proposing that sections addressing these issues be added to Chapter 607, the Florida Business Corporation Act ("FBCA"). The proposed legislation is largely based on the MBCA, but also folds in certain aspects of the DGCL Sections 204 and 205.

Proposed Sections 607.0145-607.0152 provide a statutory ratification procedure for corporate actions that may not have been properly authorized and shares that may have been improperly issued. The statutory ratification procedure is designed to supplement common law ratification. Corporate actions ratified under these proposed provisions would remain subject to equitable review.

Examples of defective corporate actions subject to ratification under these proposed provisions include the failure of the incorporator to validly appoint an initial board of directors, corporate action taken in the absence of board resolutions authorizing the action, the failure to obtain the requisite shareholder approval of a corporate action, an issuance of shares in the absence of evidence that consideration payable to the corporation for shares was received, the failure to comply with appraisal requirements, an overissuance of shares that were not authorized prior to their issuance, and the issuance of shares without complying with preemptive rights. The ratification procedure is intended to be available only where there is objective evidence that a corporate action was defectively implemented. For example, these proposed provisions would permit ratification of shares previously issued but subsequently determined to have been issued

improperly. It would not permit the corporation to issue shares retroactively as of an earlier date, however, where there is no objective evidence that those shares had previously been issued. Objective evidence may include resolutions, issuance of share certificates, subscription or share purchase agreements, entries in a share ledger or other correspondence indicating that shares were issued or intended to have been issued.

I. General Provisions

(MBCA §§1.45 and 1.46, Proposed FBCA §§607.0145 and 607.0146)

These proposals substantially follow the MBCA. Many of the definitions in proposed §607.0145 were made intentionally broad so as to permit ratification of any corporate action that, except for the failure of the corporation to properly authorize the corporation, would have been within its power.

Proposed Sections 607.0145(3) and (5) – Definitions of “Defective Corporate Action” and “Overissue.” The term “defective corporate action” includes an “overissue” of shares and other defects in share issuances that could cause shares to be treated as void. For purposes of determining which shares are overissued, only those shares issued in excess of the number of shares permitted to be issued under s. 607.0601 of the FBCA would be deemed overissued shares. If it cannot be determined from the records of the corporation which shares were issued before others, all shares included in an issuance that is or results in an overissue would be overissued shares.

Proposed Section 607.0145(8) – Definition of “Validation effective time.” This proposed subsection departs from the MBCA in order to make it clear that if articles of validation (as set forth in subsequent sections) are required to be filed to complete the ratification of particular defective acts, the “validation effective time” will not occur until such filing is actually made in accordance with s. 607.0151.

Proposed Section 607.0146(1). This proposed subsection does not distinguish between “void” (per se invalid) or “voidable” (invalid upon challenge) actions. Instead, any defective corporate action that is ratified or validated under the proposed additions will not be considered to be void or voidable. In addition, this subsection expressly makes clear that effectiveness of the ratification of a defective corporate action in accordance with the requirements of s. 607.0147 requires compliance not only with that provision, but also requires the filing of articles of validation if such filing is required under s. 607.0151.

Proposed Section 607.0146(2). This proposed subsection makes it clear that the corporation's ratification of a voidable corporate action under existing common law precedent will continue to be valid, and that the provisions of this subsection are not the only way for a corporation to ratify a voidable corporate action. However, proposed Sections 607.0145-607.0152 are designed such that any ratification of defective corporate actions that are completed in accordance with such proposed sections would bring more certainty to the ratification process.

Proposed Section 607.1046(3). This proposed subsection provides that an overissue of shares over and above the number authorized in the corporation's articles of incorporation can be remedied by the adoption of an amendment to the articles of incorporation or other corporate action that authorizes or creates the putative shares that resulted in the overissuance. If the corporation does so, the shares are deemed to have been valid from the date of issuance. This provision enables a corporation to cure an overissue occurring when shares have been duly authorized but are issued before articles of amendment are filed. It also permits a corporation to remedy an overissue even if it cannot specifically identify the putative shares.

II. Procedures for Remedying Defective Corporate Acts (MBCA §§1.47-1.50, Proposed FBCA §§607.0147-607.0150)

These sections set forth the steps that (if the increased certainty provided in this proposed legislation is desired) must be used by a Florida corporation in order to remedy defective corporate actions.

Proposed Section 607.0147 (Ratification of Defective Corporate Actions). This proposed new section, based on Section 1.47 of the MBCA, sets forth the basic procedures by which a corporation can ratify void or voidable corporate actions.

Subsection 1. This proposed subsection, which is identical to Section 1.47(a) of the MBCA, sets forth the requirements for a board of directors to take any actions with regard to defective acts (other than the election of the board of directors itself, the procedures for which are set forth in subsection (2) below.) The information required by proposed subsection 607.0147(1)(a) regarding the listing of putative shares may be satisfied by attaching a table, including a capitalization table, listing the putative shares.

Subsection 2. This proposed subsection is also identical to the matching subsection of the MBCA, Section 1.47(b). The subsection eliminates the confusion with regard to defective appointment of a board of directors; that is, if the board of directors itself was not properly ratified, how can it take action to ratify itself? The subsection therefore allows for the board of directors, even if improperly appointed, to ratify its own defective appointment.

Subsection 3. This proposed subsection discusses instances where shareholder approval is required for ratification (for example, a defective issuance of shares requiring the amendment to the articles of incorporation to authorize additional shares or an additional class of shares, as opposed to a draw down by the board of directors under a properly authorized class of “blank check” preferred) and states that, after the board of directors takes action under subsection (1), it must refer the matter to shareholders in accordance with proposed section 607.0148 below.

Subsection 4. This subsection clarifies that the board of directors may abandon ratification even after approval without further action.

Proposed Section 607.0148 (Action on Ratification). This proposed new section is based on Section 1.48 of the MBCA and sets forth specific procedural requirements for the ratification of defective corporate actions.

Consistent with both Section 1.48 of the MBCA and Section 204 of the DGCL, notice is required to be provided to the holders of all shares, whether voting or non-voting. Further, consistent with both Section 1.48 of the MBCA and Section 204 of the DGCL, notice of the meeting or notice of the written consent, as the case may be, must be provided to both current shareholders of the corporation and shareholders who held shares as of the date of the occurrence of the defective corporate action. However, notice is not required to be given to persons who are no longer shareholders of the corporation at the time that the corporation is seeking ratification of the defective corporate actions but did not own their shares at the time of the defective corporate action (i.e., those who first acquired shares after the time of the defective corporate action, but disposed of all their shares by the time the corporation is seeking ratification of the defective corporate actions).

Subsection 1. This proposed subsection, based on Section 1.48(a) of the MBCA, states that that the quorum and voting requirements for an action taken by the board of directors under Section 607.0148(1) are subject to the same quorum and voting requirements for the same action set forth in the FBCA or the corporation's constituent documents taken in other circumstances. For example, if taking an action would require a supermajority to approve, it would also take a supermajority to ratify.

Subsection 2. This proposed subsection requires notice to be given to shareholders whether the defective corporate action is to be ratified at a meeting or by written consent.

Paragraph (a) of this proposed subsection, based on Section 1.48(b) of the MBCA, states that if ratification by shareholders is required and where approval is to be completed at an annual or special meeting of shareholders, the corporation must notify each owner of valid and putative shares, whether or not those shares are entitled to vote. The record date for any such meeting is deemed to be the date on which the defective action occurred. Notwithstanding, if the identity of holders of valid or putative shares cannot be determined from the records of the corporation, notice is not required. The proposed subsection also sets forth the notice requirements for any notices sent to shareholders under subsection (2) and states the materials and information that must accompany the notice.

Paragraph (b) of this proposed subsection, which is not in the MBCA, makes it express that if the defective corporate action is to be ratified by written consent, the corporation must notify each person who is a holder of valid and putative shares, regardless of whether entitled to vote, as of the record date for the action by written consent, and each person who is a holder of valid and putative shares, regardless of whether entitled to vote, as of the date of the occurrence of the defective corporate action. This is implied by the applicable provisions of the MBCA and the DGCL.

In both cases (i.e., meeting or written consent), the information required to be provided is the same.

Subsections 3 and 4. These proposed subsections are a mirror of subsection 1 relating to shareholders and are based on Sections 1.48(c) and (d) of the MBCA. Proposed subsection 3 states that the rule requiring that the same voting and quorum requirements remain in place, except where the action relates to the ratification of directors. Actions relating to directors are set forth in proposed subsection (4), which requires that each director receive more votes in favor of ratification than against be cast by shareholders at a meeting where a quorum is present and clarifies that, in the case of action taken by written consent of shareholders, the consents given favoring ratification by a voting group must represent a majority of the shares of such voting group.

Subsection 5. This proposed subsection is based on Section 1.48(e) of the MBCA and clarifies that putative shares existing on the record date are only entitled to notice of matters relating to ratification and that such shares are not entitled to vote, are not counted for quorum purposes, and are not counted in any written consent.

Subsection 6. This proposed subsection is based on Section 1.48(f) of the MBCA and clarifies that to ratify putative shares, whether by vote or by written consent, an amendment to the articles of incorporation must be approved.

Proposed Section 607.0149 (Notice Requirements). This proposed section and its subsections are based on section 1.49 of the MBCA and details notice requirements to shareholders and holders of putative shares when shareholder action to approve the ratification of the defective corporate action is not required. This proposed provision, like the corollary MBCA provision, contemplates "prompt" notice to shareholders following the ratification of a corporate action by the board of directors, which is intended to mean as soon as reasonably practicable under the applicable facts and circumstances.

Unlike s. 607.0704(7) of the FBCA, this section does not state that the failure to provide the notice does not invalidate the action taken. This is intended to make clear that to take advantage of the statutory ratification provisions in this proposed statute, the required notice must be given to shareholders and putative holders. It should be recognized that where the notice is required, the validation effective time will not occur until the notice is given, or if also required, the articles of validation are filed, if later.

Subsection 1. Where shareholder action on ratification is not required, a corporation must provide prompt notice to each shareholder (including to each putative shareholder) regarding the date of action and the date of the ratification.

Subsection 2. If notice is given under proposed subsection 1, this proposed subsection sets forth the content of the required notice. This includes (i) a copy of the action taken by the board of directors (ii) the information required by proposed subsections 607.0147(1)(a) through (1)(d) or proposed subsections 607.0147(2)(a) through (2)(c), as applicable and (iii) a statement that a claim asserting that ratification of the

defective corporate action (including any putative shares issued thereby) should not be effective must be brought within 120 days from the applicable validation effective time.

Subsection 3. Clarifies that if notice is given under proposed subsection (2), no additional notice is required for shareholder approval. This is because the information contemplated by the notice is already required to be provided in the notice of any shareholder meeting or in connection with the solicitation of written consents of shareholders.

Subsection 4. Clarifies that any notice under this proposed section may be given in any manner required under existing section 607.0141 of the FBCA, and, in the case of a public company, notice may be given by means required by the United States Securities and Exchange Commission.

Proposed Section 607.0150 (Effect of Ratification). This proposed section and its subsections are based on section 1.50 of the MBCA and set forth specifics on how ratification, upon proper notice, affects the corporation and the timing of any ratification. Ratification is effective as of the validation effective time and is not dependent on the expiration of the 120-day time period in which an action challenging the ratification must be brought.

Subsection 1. Where a defective corporate action is properly ratified, it is deemed no longer void or voidable and is deemed for all intents and purposes to be a validly approved corporate action, effective as of the date of the original defective act.

Subsection 2. Similarly, issuances of putative shares, or fractions of a putative share, as the case may be, are deemed to be issuances of identical valid shares, or fractions of shares, on the date on which the putative share or fraction of a putative share was purportedly issued (as if it were issued back when it was originally purportedly issued).

Subsection 3. Any actions taken subsequent to the initial defective corporate action, but before the ratification thereof, are also deemed to be valid, as of the date the original action was taken. In other words, the ratification of a defective corporate action has the additional effect of ratifying corporate actions that are defective because of the original defective corporate action. For example, an overissue which results in subsequent director elections being invalid calls into question all actions by the invalidly elected board members. The ratification of the overissue, however, would cure any such additional defects.

III. Filings (MBCA §1.51, Proposed FBCA §607.0151)

This proposed section sets forth requirements for filings both where filings were not made and where they were made incorrectly, and is intended to provide a clear public record of the actions relating to the ratification. This proposed section and its subsections are based on Section 1.51 of the MBCA. Proposed section 607.0151 requires that in the event any filing is or would have been required under the FBCA to effect the defective corporate action, such filing (if

no filing was previously made) or such corrected filing (if correction to a previous filing is required) be attached as an exhibit to the articles of validation.

Consistent with recent changes to Section 204 of the DCGL, this proposal eliminates the required filing of articles of validation if changes to the previous filing made with the Florida Department of State are not required in order for the prior filing to be accurate following the ratification. The MBCA does not eliminate that requirement.

Subsection 1. Where a filing would have been required for the ratified defective corporate action, regardless of whether or not such filing was properly made, a corporation must file articles of validation with the Florida Department of State, which serves to amend, or serves as a substitute for, any filings related to the defective corporate action.

Subsections 2 and 3. Like their MBCA counterparts, these subsections set forth requirements for the content of articles of validation filings with the Florida Department of State.

IV. Judicial Proceedings.
(MBCA §1.52, Proposed FBCA §607.0152)

This section confers jurisdiction on the designated court to hear and determine claims regarding the validity of any corporate action. Subsections 1-4 are based on subsections (a)-(d) of Section 1.52 of the MBCA.

Subsection 1. A corporation or successor thereto, a director of a corporation, or any shareholder of the corporation may apply to a court to determine the validity of any corporate action (or ratified defective corporate action).

Subsection 2. When an application is made under subsection 1, the court may make any findings or orders it deems proper under the circumstances.

Subsection 3. Clarifies that service of process for any such proceeding is the same as that of any proceeding as set forth in Chapter 48, Florida Statutes.

Subsection 4. Any action taken must be brought within 120 days of the "validation effective time", as defined in proposed section 607.0145(8).

Proposed subsections 5 and 6 are not a part of the MBCA. However, they are derived from the DCGL and are being suggested by the Chapter 607 Drafting Subcommittee in order to give additional guidance to the courts.

Subsection 5. In an effort to assist the court, this proposed subsection sets forth a non-exclusive list of various factors that may be considered by the court with respect to cases brought under this proposed section.

Subsection 6. In order to assist the court, this proposed subsection sets forth certain actions that the court may decide to take, including declaring any acts to be effective or ineffective as well as the date of validity. Proposed subsection (6)(j) allows for the awarding of attorney's fees and other reasonable expenses against a corporation where the court finds such award to be just and equitable under the circumstances.

Attachment 2

Proposed Revisions to Chapter 607

1 RATIFICATION OF DEFECTIVE CORPORATE ACTIONS

2

3 § 607.0145. Definitions.

4 As used in ss. 607.0145-607.0152:

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

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

12 (3) "Defective corporate action" means:

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

17 (b) An overissue.

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

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

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

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

30 (6) "Putative shares" means the shares of any class or series,
31 including shares issued upon exercise of rights, options, warrants
32 or other securities convertible into shares of the corporation, or
33 interests with respect to such shares, that were created or issued

34 as a result of a defective corporate action, that (i) but for any
35 failure of authorization would constitute valid shares, or (ii)
36 cannot be determined by the board of directors to be valid shares.

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

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

44 (a) The date on 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;

49 (b) If no articles of validation are required to be filed in
50 accordance with s. 607.0151, the date on which the notice
51 required by s. 607.0149 becomes effective in accordance with
52 s. 607.0141; and

53 (c) If articles of validation are required to be filed in
54 accordance with s. 607.0151, the date on which the articles
55 of validation filed in accordance with s. 607.0151 become
56 effective.

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

60

61 § 607.0146 Defective Corporate Actions.

62 (1) A defective corporate action will not be void or voidable if:

63

64 (a) Ratified in accordance with the requirements of s.
65 607.0147, including the filing, if required, of articles
66 of validation under s. 607.0151, or

67

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

69 (2) Ratification under s. 607.0147 or validation under s.
70 607.0152 shall not be deemed to be the exclusive means of ratifying
71 or validating any defective corporate action, and the absence or
72 failure of ratification in accordance with ss. 607.0145-607.0152
73 will not, in and of itself, affect the validity or effectiveness
74 of any corporate action properly ratified under common law or
75 otherwise, nor will it create a presumption that any such corporate
76 action is or was a defective corporate action or void or voidable.

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

80 (a) The effectiveness under ss. 607.0145-607.0152 and under
81 ss. 607.1001 - 607.1009 of an amendment to the articles of
82 incorporation authorizing, designating or creating such
83 shares; or

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

87

88 § 607.0147 Ratification of Defective Corporate Actions.

89 (1) To ratify a defective corporate action under this section,
90 other than the ratification of an election of the initial board of
91 directors under subsection (2), the board of directors must take
92 action ratifying the action in accordance with s. 607.0148,
93 stating:

94 (a) The defective corporate action to be ratified and, if the
95 defective corporate action involved the issuance of putative
96 shares, the number and type of putative shares purportedly
97 issued;

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

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

101 (d) That the board of directors approves the ratification of
102 the defective corporate action.

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

108 (a) The name of the person or persons who first took action
109 in the name of the corporation as the initial board of
110 directors of the corporation;

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

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

116 (3) If any provision of this chapter, the articles of
117 incorporation or bylaws, any corporate resolution or any plan or
118 agreement to which the corporation is a party in effect at the
119 time action under subsection (1) is taken requires shareholder
120 approval or would have required shareholder approval at the date
121 of the occurrence of the defective corporate action, the
122 ratification of the defective corporate action approved in the

123 action taken by the directors under subsection (1) must be
124 submitted to the shareholders for approval in accordance with s.
125 607.0148.

126 (4) Unless otherwise provided in the action taken by the board of
127 directors under subsection (1), after the action by the board of
128 directors has been taken and, if required, approved by the
129 shareholders, the board of directors may abandon the ratification
130 at any time before the validation effective time without further
131 action of the shareholders.

132

133 § 607.0148 Action on Ratification.

134 (1) The quorum and voting requirements applicable to a ratifying
135 action by the board of directors under s. 607.0147(1) will be the
136 quorum and voting requirements applicable to the corporate action
137 proposed to be ratified at the time such ratifying action is taken.

138 (2) (a) If the ratification of the defective corporate action
139 requires approval by the shareholders under s. 607.0147(3), and if
140 the approval is to be given at a meeting, the corporation must
141 notify each holder of valid and putative shares, regardless of
142 whether entitled to vote, as of the record date for notice of the
143 meeting, and as of the date of the occurrence of the defective
144 corporate action, provided that notice will not be required to be
145 given to holders of valid or putative shares whose identities or
146 addresses for notice cannot be determined from the records of the
147 corporation. The notice must state that the purpose, or one of the
148 purposes, of the meeting, is to consider ratification of a
149 defective corporate action.

150 (b) If the ratification of the defective corporate action
151 requires approval by the shareholders under s. 607.0147(3), and if
152 the approval is to be ratified by one or more written consents of
153 the shareholders, the corporation must notify each holder of valid
154 and putative shares, regardless of whether entitled to vote, as of
155 the record date for the action by written consent, and as of the
156 date of the occurrence of the defective corporate action, provided
157 that notice will not be required to be given to holders of valid
158 or putative shares whose identities or addresses for notice cannot
159 be determined from the records of the corporation. The notice must
160 state that the purpose, or one of the purposes, of the written
161 consent was to consider ratification of a defective corporate
162 action.

163 (c) The notice must be accompanied by:

164 1. Either a copy of the action taken by the board of
165 directors in accordance with s. 607.0147(1) or the
166 information required by ss. 607.0147(1)(a) through (1)(d),
167 and

168 2. A statement that any claim asserting that the
169 ratification of such defective corporate action, and any

170 putative shares issued as a result of such defective
171 corporate action, should not be effective, or should only be
172 effective on certain conditions, must be brought, if at all,
173 within 120 days from the applicable validation effective
174 time.

175 (3) Except as provided in subsection (4) with respect to the
176 voting requirements to ratify the election of a director, any
177 quorum and the voting requirements applicable to the approval by
178 the shareholders required by s. 607.0147(3) will be the quorum and
179 voting requirements applicable, at the time of such shareholder
180 approval, to the corporate action proposed to be ratified.

181 (4) The approval by shareholders at a meeting to ratify the
182 election of a director requires that the votes cast within the
183 voting group favoring such ratification exceed the votes cast
184 opposing such ratification of the election at a meeting at which
185 a quorum is present. The approval by shareholders by written
186 consent to ratify the election of a director requires that the
187 consents given within the voting group favoring such ratification
188 represent a majority of the shares of the voting group.

189 (5) Putative shares on the record date for determining the
190 shareholders entitled to vote on any matter submitted to
191 shareholders under s. 607.0147(3), and without giving effect to
192 any ratification of putative shares that becomes effective as a
193 result of such vote, will neither be entitled to vote nor counted
194 for quorum purposes in any vote to approve the ratification of any
195 defective corporate action. Putative shares on the record date
196 for the action by written consent, and without giving effect to
197 any ratification of putative shares that becomes effective as a
198 result of such written consent, will not be entitled to be counted
199 in any written consent to approve the ratification of any defective
200 corporate action.

201 (6) If the approval under this section of putative shares would
202 result in an overissue, in addition to the approval required by s.
203 607.0147, approval of an amendment to the articles of incorporation
204 under ss. 607.1001 - 607.1009 to increase the number of shares of
205 an authorized class or series or to authorize the creation of a
206 class or series of shares so there would be no overissue will also
207 be required.

208 §607.0149 Notice Requirements.

209 (1) Unless shareholder approval is required under s. 607.0147(3),
210 prompt notice of an action taken by the board of directors under
211 s. 607.0147 must be given to each holder of valid shares and each
212 holder of putative shares, regardless of whether entitled to vote,
213 that is a holder of valid shares or a holder of putative shares as
214 of:

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

217 (b) The date of the occurrence of the defective corporate
218 action being ratified;

219 provided that notice will not be required to be given to those
220 holders of valid shares or those holders of putative shares whose
221 identities or addresses for notice cannot be determined from the
222 records of the corporation.

223 (2) The notice must contain:

224 (a) Either:

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

227 2. The information required by ss. 607.0147(1)(a)
228 through (1)(d) or ss. 607.0147(2)(a) through (2)(c), as
229 applicable; and

230 (b) A statement that, in order to be considered, any claim
231 asserting that the ratification of the defective corporate
232 action, and any putative shares issued as a result of such
233 defective corporate action, should not be effective, or
234 should be effective only on certain conditions, must be
235 brought, if at all, within 120 days from the applicable
236 validation effective time.

237 (3) No notice under this section is required with respect to any
238 action required to be submitted to shareholders for approval under
239 s. 607.0147(3) if notice is given in accordance with s.
240 607.0148(2).

241 (4) A notice required by this section may be given in any manner
242 permitted by s. 607.0141 and, for any corporation subject to the
243 reporting requirements of Section 13 or 15(d) of the Securities
244 Exchange Act of 1934, may be given by means of a filing or
245 furnishing of such notice with the United States Securities and
246 Exchange Commission.

247

248 § 607.0150 Effect of Ratification.

249 From and after the validation effective time, and without regard
250 to the 120-day period during which a claim may be brought under s.
251 607.0152:

252 (1) Each defective corporate action ratified in accordance with
253 s. 607.0147 will not be void or voidable as a result of the failure
254 of authorization set forth and identified in the action taken under
255 s. 607.0147(1) or (2) and will be deemed a valid corporate action
256 effective as of the date of the defective corporate action;

257 (2) The issuance of each putative share or fraction of a putative
258 share purportedly issued pursuant to a defective corporate action
259 identified in the action taken under s. 607.0147 will not be void
260 or voidable, and each such putative share or fraction of a putative
261 share will be deemed to be an identical share or fraction of a
262 valid share as of the time it was purportedly issued; and

263 (3) Any corporate action taken subsequent to the defective
264 corporate action ratified in accordance with ss. 607.0145 -
265 607.0152 in reliance on such defective corporate action having
266 been validly effected, and any subsequent defective corporate
267 action resulting directly or indirectly from such original
268 defective corporate action, will be valid as of the respective
269 time such corporate action was taken.

270

271 § 607.0151 Filings.

272 (1) If the defective corporate action ratified under ss. 607.0145
273 - 607.0152 would have required under any other section of this
274 chapter a filing in accordance with this chapter, and either:

275 (a) any previous filing requires any change to the filing to
276 give effect to the defective corporate action in accordance with
277 this section (including a change to the date and time of the
278 effectiveness of such filing); or

279 (b) a filing was not previously filed in respect of the
280 defective corporate action,

281 then, in lieu of a filing otherwise required by this chapter, the
282 corporation must file articles of validation in accordance with
283 this section, and such articles of validation will serve to amend
284 or be a substitute for any other filing with respect to such
285 defective corporate action required by this chapter.

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

287 (a) The defective corporate action that is the subject of
288 the articles of validation, including, in the case of any
289 defective corporate action involving the issuance of putative
290 shares, the number and type of putative shares issued and the
291 date or dates upon which such putative shares were purported
292 to have been issued;

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

294 (c) The nature of the failure of authorization in respect of
295 the defective corporate action;

296 (d) A statement that the defective corporate action was
297 ratified in accordance with s. 607.0147, including the date
298 on which the board of directors ratified such defective
299 corporate action and the date, if any, on which the
300 shareholders approved the ratification of such defective
301 corporate action; and

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

303 (3) The articles of validation must also contain the following
304 information:

305 (a) If a filing was previously made in respect of the
306 defective corporate action and such filing requires any
307 change to give effect to the ratification of such defective
308 corporate action in accordance with s. 607.0147, the articles
309 of validation must set forth:

310 1. The name, title and filing date of the filing
311 previously made and any articles of correction to that
312 filing;

313 2. A statement that a filing containing all of the
314 information required to be included under the applicable
315 section or sections of this chapter to give effect to
316 such defective corporate action is attached as an
317 exhibit to the articles of validation; and

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

320 (b) If a filing was not previously made in respect of
321 the defective corporate action and the defective corporate
322 action ratified under s. 607.0147 would have required a filing
323 under any other section of this chapter, the articles of
324 validation must set forth:

325 1. A statement that a filing containing all of the
326 information required to be included under the applicable
327 section or sections of this chapter to give effect to
328 such defective corporate action is attached as an
329 exhibit to the articles of validation; and

330 2. The date and time that such filing is deemed to
331 have become effective.

332

333 § 607.0152 Judicial proceedings regarding validity of corporate
334 actions.

335 (1) Subject to subsection (4) of this section, upon application
336 by the corporation, any successor entity to the corporation, a
337 director of the corporation, any shareholder, beneficial
338 shareholder or unrestricted voting trust beneficial owner of the
339 corporation, including any such shareholder, beneficial
340 shareholder or unrestricted voting trust beneficial owner as of
341 the date of the defective corporate action ratified under s.
342 607.0147, or any other person claiming to be substantially and
343 adversely affected by a ratification under s. 607.0147, the circuit
344 court in the applicable county may:

345 (a) Determine the validity and effectiveness of any
346 corporate action or defective corporate action ratified
347 pursuant to s. 607.0147;

348 (b) Determine the validity and effectiveness of any
349 ratification of any defective corporate action under s.
350 607.0147;

351 (c) Determine the validity and effectiveness of any
352 defective corporate action not ratified or not ratified
353 effectively under s. 607.0147;

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

355 (e) Modify or waive any of the procedures specified in s
356 607.0147 or s. 607.0148 to ratify a defective corporate
357 action.

358 (2) In connection with an action under this section, the court
359 may make such findings or orders, and take into account any factors
360 or considerations, regarding such matters as it deems proper under
361 the circumstances. Factors that may be taken into account by the
362 court in connection with an action under this section include those
363 set forth in subsection (5) and a non-exclusive list of findings
364 or orders that the court may take under this section is included
365 in subsection (6).

366 (3) Service of process of the application under subsection (1) on
367 the corporation may be made in any manner provided by chapter 48
368 for service on the corporation, and no other party need be joined

369 in order for the court to adjudicate the matter. In an action filed
370 by the corporation, the court may require notice of the action be
371 provided to other persons specified by the court and permit such
372 other persons to intervene in the action.

373 (4) Notwithstanding any other provision of this section or
374 otherwise under applicable law, any action asserting that the
375 ratification of any defective corporate action, and any putative
376 shares issued as a result of such defective corporate action,
377 should not be effective, or should be effective only on certain
378 conditions, must be brought, if at all, within 120 days of the
379 validation effective time.

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

382 (a) Whether the defective corporate action was originally
383 approved or effectuated with the belief that the approval or
384 effectuation was in compliance with the provisions of this
385 title, the articles of incorporation or the bylaws of the
386 corporation;

387 (b) Whether the corporation and board of directors has treated
388 the defective corporate action as a valid act or transaction
389 and whether any person has acted in reliance on the public
390 record that such defective corporate action was valid;

391 (c) Whether any person will be or was harmed by the
392 ratification or validation of the defective corporate action,
393 excluding any harm that would have resulted if the defective
394 corporate action had been valid when approved or effectuated;

395 (d) Whether any person will be harmed by the failure to ratify
396 or validate the defective corporate action; and

397 (e) Whether the defective corporate action was a conflict of
398 interest transaction; and

399 (f) Any other factors or considerations the court deems just
400 and equitable.

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

403 (a) Declare that a ratification in accordance with and
404 pursuant to s. 607.0146 is not effective or shall only be
405 effective at a time or upon conditions established by the
406 court;

407 (b) Validate and declare effective any defective corporate
408 action or putative stock and impose conditions upon such
409 validation by the court;

410 (c) Require measures to remedy or avoid harm to any person
411 substantially and adversely affected by a ratification
412 pursuant to s. 607.0146 or from any order of the court
413 pursuant to this section, excluding any harm that would have
414 resulted if the defective corporate action had been valid
415 when approved or effectuated;

416 (d) Order the department to accept an instrument for filing
417 with an effective time specified by the court, which effective
418 time may be prior or subsequent to the time of such order,
419 provided that the filing date of such instrument shall be
420 determined in accordance with s. 607.0123;

421 (e) Approve a stock ledger for the corporation that includes
422 any shares ratified or validated in accordance with this
423 section or s. 607.0146;

424 (f) Declare that the putative shares are valid shares or
425 require a corporation to issue and deliver valid shares in
426 place of any putative shares;

427 (g) Order that a meeting of holders of valid shares or
428 putative shares be held and exercise such powers that it deems
429 appropriate with respect to such a meeting;

430 (h) Declare that a defective corporate action validated by
431 the court shall be effective as of the time of the defective
432 corporate action or at such other time as the court shall
433 determine;

434 (i) Declare that putative shares validated by the court shall
435 be deemed to be an identical valid share or fraction of a
436 valid share as of the time originally issued or purportedly
437 issued or at such other time as the court shall determine;

438 (j) Require the payment by the corporation of reasonable
439 expenses (including attorney's fees and costs) that the court
440 finds just and equitable under the circumstances; and

441 (k) Make such other orders regarding such matters as it deems
442 proper under the circumstances.

Attachment 3

Triple Motion Language

The following triple motion was made by _____, seconded _____:

RESOLVED, that the Florida Bar Business Law Section (the "Section") supports proposed legislation addressing changes and updates to Chapter 607, Florida Statutes, the Florida Business Corporations Act, primarily including the addition of provisions addressing ratification of defective corporate actions and overissuances of securities, substantially in the form of the draft legislation, draft dated as of _____, 2023 presented to the Executive Council of the Section, and subject to such further changes as are deemed appropriate and approved by (i) the Chapter 607 Subcommittee, and (ii) the Executive Committee of the Section; and it is further

RESOLVED, that the Proposed Legislation: (1) is within the Section's subject matter jurisdiction as described in the Section's bylaws; (2) either is beyond the scope of the bar's permissible legislative or political activity, or is within the bar's permissible scope of legislative or political activity and the proposed Section position is consistent with an official bar position on that issue; and (3) does not have the potential for deep philosophical or emotional division among a substantial segment of the bar's membership.