

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

§ 607.0146 Defective Corporate Actions.

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

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

(b) Validated in accordance with s. 607.0152.

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

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

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

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

§ 607.0147 Ratification of Defective Corporate Actions.

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

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

(b) The date of the defective corporate action;

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

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

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

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

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

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

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

§ 607.0148 Action on Ratification.

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

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

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

(c) The notice must be accompanied by:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Declare that putative shares validated by the court shall be deemed to be an identical valid share or fraction of a valid share as of the time originally issued or purportedly 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.