

Subchapter E.

RATIFICATION OF DEFECTIVE CORPORATE ACTIONS

§ 1.45 Definitions

Subchapter E In this subchapter:

“Corporate action” means any action taken by or on behalf of the corporation, including any action taken by the incorporator, the board of directors, a committee of the board of directors, an officer or agent of the corporation or the shareholders.

“Date of the defective corporate action” means the date (or the approximate date, if the exact date is unknown) the defective corporate action was purported to have been taken.

“Defective corporate action” means (i) any corporate action purportedly taken that is, and at the time such corporate action was purportedly taken would have been, within the power of the corporation, but is void or voidable due to a failure of authorization, and (ii) an overissue.

“Failure of authorization” means the failure to authorize, approve or otherwise effect a corporate action in compliance with the provisions of this Act, the articles of incorporation or bylaws, a corporate resolution or any plan or agreement to which the corporation is a party, if and to the extent such failure would render such corporate action void or voidable.

“Overissue” means the purported issuance of:

(i) shares of a class or series in excess of the number of shares of a class or series the corporation has the power to issue under section 6.01 at the time of such issuance; or

(ii) shares of any class or series that is not then authorized for issuance by the articles of incorporation.

“Putative shares” means the shares of any class or series (including shares issued upon exercise of rights, options, warrants or other securities convertible into shares of the corporation, or interests with respect to such shares) that were created or issued as a result of a defective corporate action, that (i) but for any failure of authorization would constitute valid shares, or (ii) cannot be determined by the board of directors to be valid shares.

“Valid shares” means the shares of any class or series that have been duly authorized and validly issued in accordance with this Act, including as a result of ratification or validation under this subchapter.

“Validation effective time” with respect to any defective corporate action ratified under this subchapter means the later of:

(i) the time at which the ratification of the defective corporate action is approved by the shareholders, or if approval of shareholders is not required, the time at

which the notice required by section 1.49 becomes effective in accordance with section 1.41; and

(ii) the time at which any articles of validation filed in accordance with section 1.51 become effective.

The validation effective time shall not be affected by the filing or pendency of a judicial proceeding under section 1.52 or otherwise, unless otherwise ordered by the court.

CROSS-REFERENCES

Authorized shares, see § 6.01.

Corporate powers, see § 3.02.

Issuance of shares, see § 6.21.

Lack of power to act, see § 3.04.

Share rights, options, warrants and awards, see § 6.24.

OFFICIAL COMMENT

The definitions of “corporate action,” “defective corporate action” and “failure of authorization” are intentionally broad so as to permit ratification of any corporate action purportedly taken that would have been within the power granted to a corporation under the Act.

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 section 6.01 of the Act 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.

§ 1.46 Defective Corporate Actions

- (a) A defective corporate action shall not be void or voidable if ratified in accordance with section 1.47 or validated in accordance with section 1.52.
- (b) Ratification under section 1.47 or validation under section 1.52 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 this subchapter shall not, of itself, affect the validity or effectiveness of any corporate action properly ratified under common law or otherwise, nor shall it create a presumption that any such corporate action is or was a defective corporate action or void or voidable.
- (c) In the case of an overissue, putative shares shall be valid shares effective as of the date originally issued or purportedly issued upon:

- (1) the effectiveness under this subchapter and under chapter 10 of an amendment to the articles of incorporation authorizing, designating or creating such shares; or
- (2) the effectiveness of any other corporate action under this subchapter ratifying the authorization, designation or creation of such shares.

CROSS-REFERENCES

Amendment of articles of incorporation by board of directors and shareholders, see § 11.03.

Authorized shares, see § 6.01.

Correcting filed documents, see § 1.24.

OFFICIAL COMMENT

Subchapter E provides 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 this subchapter remain subject to equitable review.

Examples of defective corporate actions subject to ratification 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, 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 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, subchapter E 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.

Section 1.46(a) does not distinguish between void and voidable actions. Instead it provides that any defective corporate action that is ratified in accordance with section 1.47 or validated under section 1.52 shall not be void or voidable. Section 1.47 is not the exclusive means by which a defective corporate action may be ratified. Thus, the general common law doctrine of ratification, as applied to a board of directors' adoption of actions taken by officers who may not have had the actual authority to take such actions, continues to be an effective mode of ratification. Section 1.46(b) makes clear that the corporation's ratification of a defective corporate action that is voidable but not void using common law methods of ratification rather than under section 1.47 will not, standing alone, affect the validity of the action or create a presumption that the action is not valid. In addition, ratification under subchapter E is distinct from correction of an already filed document under section 1.24.

Section 1.46(c) provides that an overissue can be remedied by the adoption of articles of amendment or other corporate action that has the effect of authorizing, designating or creating shares of a series or class, such that the putative shares that resulted in the overissue are deemed to be validly issued from the date of original 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.

§ 1.47 Ratification of Defective Corporate Actions

- (a) To ratify a defective corporate action under this section (other than the ratification of an election of the initial board of directors under subsection § 1.47(b)), the board of directors shall take action ratifying the action in accordance with section 1.48, stating:
 - (1) 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;
 - (2) the date of the defective corporate action;
 - (3) the nature of the failure of authorization with respect to the defective corporate action to be ratified; and
 - (4) that the board of directors approves the ratification of the defective corporate action.
- (b) 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 section 2.05(a)(2), a majority of the persons who, at the time of the ratification, are exercising the powers of directors may take an action stating:
 - (1) 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;
 - (2) 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
 - (3) that the ratification of the election of such person or persons as the initial board of directors is approved.
- (c) If any provision of this Act, 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 § 1.47(a) 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 action taken by the directors under subsection § 1.47(a) shall be submitted to the shareholders for approval in accordance with section 1.48.
- (d) Unless otherwise provided in the action taken by the board of directors under subsection § 1.47(a), after the action by the board of directors has been taken and, if required,

approved by the shareholders, the board of directors may abandon the ratification at any time before the validation effective time without further action of the shareholders.

CROSS-REFERENCES

Organization of corporation, see § 2.05.

Requirement for and functions of board of directors, see § § 8.01.

OFFICIAL COMMENT

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

§ 1.48 Action on Ratification

- (a) The quorum and voting requirements applicable to a ratifying action by the board of directors under section 1.47(a) shall be the quorum and voting requirements applicable to the corporate action proposed to be ratified at the time such ratifying action is taken.
- (b) If the ratification of the defective corporate action requires approval by the shareholders under section 1.47(c), and if the approval is to be given at a meeting, the corporation shall 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 defective corporate action, provided that notice shall 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 and must be accompanied by (i) either a copy of the action taken by the board of directors in accordance with section 1.47(a) or the information required by sections 1.47(a)(1) through (a)(4), and (ii) a statement that any claim 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 be effective only on certain conditions, shall be brought within 120 days from the applicable validation effective time.
- (c) Except as provided in subsection § 1.48(d) with respect to the voting requirements to ratify the election of a director, the quorum and voting requirements applicable to the approval by the shareholders required by section 1.47(c) shall be the quorum and voting requirements applicable to the corporate action proposed to be ratified at the time of such shareholder approval.
- (d) The approval by shareholders 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.

- (e) Putative shares on the record date for determining the shareholders entitled to vote on any matter submitted to shareholders under section 1.47(c) (and without giving effect to any ratification of putative shares that becomes effective as a result of such vote) shall neither be entitled to vote nor counted for quorum purposes in any vote to approve the ratification of any defective corporate action.
- (f) If the approval under this section of putative shares would result in an overissue, in addition to the approval required by section 1.47, approval of an amendment to the articles of incorporation under chapter 10 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 shall also be required.

CROSS-REFERENCES

Notices and other communications, see § 1.41.

Quorum and voting requirements for the board of directors, see § 8.24.

Quorum and voting requirements for voting groups, see § 7.25.

OFFICIAL COMMENT

Notwithstanding the shareholder notice required by section 1.48(b), only valid shares are entitled to vote on the ratification action or counted for quorum purposes. The retroactive effect of a ratification of putative shares does not invalidate the quorum or voting result of the ratification.

For matters other than the election of directors, the quorum and voting requirements applicable to shareholder approval of ratification are the quorum and voting requirements applicable to the corporate action being ratified at the time of such approval. For example, if the defective corporate action being ratified is an amendment to the articles of incorporation, whether in connection with an overissue or otherwise, the vote required would be governed by section 10.03. If the defective corporate action involves a merger, the vote required would be the vote required by section 11.04.

§ 1.49 Notice Requirements

- (a) Unless shareholder approval is required under section 1.47(c), prompt notice of an action taken under section 1.47 shall be given to each holder of valid and putative shares, regardless of whether entitled to vote, as of (i) the date of such action by the board of directors and (ii) the date of the defective corporate action ratified, provided that notice shall not be required to be given to holders of valid and putative shares whose identities or addresses for notice cannot be determined from the records of the corporation.
- (b) The notice must contain (i) either a copy of the action taken by the board of directors in accordance with section 1.47(a) or (b) or the information required by sections 1.47(a)(1) through (a)(4) or sections 1.47(b)(1) through (b)(3), as applicable, and (ii) a statement that any claim that the ratification of the 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, shall be brought within 120 days from the applicable validation effective time.

- (c) No notice under this section is required with respect to any action required to be submitted to shareholders for approval under section 1.47(c) if notice is given in accordance with section 1.48(b).
- (d) A notice required by this section may be given in any manner permitted by section 1.41 and, for any corporation subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934, may be given by means of a filing or furnishing of such notice with the United States Securities and Exchange Commission.

CROSS REFERENCES

Corporate records, see § 16.01.

Householding, see § 1.44.

Notices and other communications, see § 1.41.

§ 1.50 Effect of Ratification

From and after the validation effective time, and without regard to the 120-day period during which a claim may be brought under section 1.52:

- (a) Each defective corporate action ratified in accordance with section 1.47 shall not be void or voidable as a result of the failure of authorization identified in the action taken under section 1.47(a) or (b) and shall be deemed a valid corporate action effective as of the date of the defective corporate action;
- (b) The issuance of each putative share or fraction of a putative share purportedly issued pursuant to a defective corporate action identified in the action taken under section 1.47 shall not be void or voidable, and each such putative share or fraction of a putative share shall be deemed to be an identical share or fraction of a valid share as of the time it was purportedly issued; and
- (c) Any corporate action taken subsequent to the defective corporate action ratified in accordance with this subchapter in reliance on such defective corporate action having been validly effected and any subsequent defective corporate action resulting directly or indirectly from such original defective corporate action shall be valid as of the time taken.

OFFICIAL COMMENT

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. The ratification of a defective corporate action has the additional effect of ratifying corporate actions that are defective as a result 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.

§ 1.51 Filings

- (a) If the defective corporate action ratified under this subchapter would have required under any other section of this Act a filing in accordance with this Act, then, regardless of whether a filing was previously made in respect of such defective corporate action and in lieu of a filing otherwise required by this Act, the corporation shall file articles of validation in accordance with this section, and such articles of validation shall serve to amend or substitute for any other filing with respect to such defective corporate action required by this Act.
- (b) The articles of validation must set forth:
 - (1) the defective corporate action that is the subject of the articles of validation (including, in the case of any defective corporate action involving the issuance of putative shares, the number and type of putative shares issued and the date or dates upon which such putative shares were purported to have been issued);
 - (2) the date of the defective corporate action;
 - (3) the nature of the failure of authorization in respect of the defective corporate action;
 - (4) a statement that the defective corporate action was ratified in accordance with section 1.47, including the date on which the board of directors ratified such defective corporate action and the date, if any, on which the shareholders approved the ratification of such defective corporate action; and
 - (5) the information required by subsection § 1.51(c).
- (c) The articles of validation must also contain the following information:
 - (1) if a filing was previously made in respect of the defective corporate action and no changes to such filing are required to give effect to the ratification of such defective corporate action in accordance with section 1.47, the articles of validation must set forth (i) the name, title and filing date of the filing previously made and any articles of correction to that filing and (ii) a statement that a copy of the filing previously made, together with any articles of correction to that filing, is attached as an exhibit to the articles of validation;
 - (2) if a filing was previously made in respect of the defective corporate action and such filing requires any change to give effect to the ratification of such defective corporate action in accordance with section 1.47, the articles of validation must set forth (i) the name, title and filing date of the filing previously made and any articles of correction to that filing and (ii) a statement that a filing containing all of the information required to be included under the applicable section or sections of the Act to give effect to such defective corporate action is attached as an exhibit to the articles of

validation, and (iii) the date and time that such filing is deemed to have become effective; or

- (3) if a filing was not previously made in respect of the defective corporate action and the defective corporate action ratified under section 1.47 would have required a filing under any other section of the Act, the articles of validation must set forth (i) a statement that a filing containing all of the information required to be included under the applicable section or sections of the Act to give effect to such defective corporate action is attached as an exhibit to the articles of validation, and (ii) the date and time that such filing is deemed to have become effective.

CROSS-REFERENCES

Correcting filed documents, see § 1.24.

Effective time and date of filing, see § 1.23.

OFFICIAL COMMENT

Section 1.51 requires that in the event any filing is or would have been required under the Act to effect the defective corporate action, such filing (if no filing was previously made), such corrected filing (if correction to a previous filing is required), or such original filing (if no correction to a previous filing is required) be attached as an exhibit to the articles of validation. This is intended to provide a clear public record of the actions relating to the ratification.

§ 1.52 Judicial Proceedings Regarding Validity of Corporate Actions

- (a) Upon application by the corporation, any successor entity to the corporation, a director of the corporation, any shareholder, beneficial shareholder or unrestricted voting trust beneficial owner of the corporation, including any such shareholder, beneficial shareholder or unrestricted voting trust beneficial owner as of the date of the defective corporate action ratified under section 1.47, or any other person claiming to be substantially and adversely affected by a ratification under section 1.47, the [name or describe court] may:
 - (1) determine the validity and effectiveness of any corporate action or defective corporate action;
 - (2) determine the validity and effectiveness of any ratification under section 1.47;
 - (3) determine the validity of any putative shares; and
 - (4) it modify or waive any of the procedures specified in section 1.47 or 1.48 to ratify a defective corporate action.
- (b) In connection with an action under this section, the court may make such findings or orders, and take into account any factors or considerations, regarding such matters as it deems proper under the circumstances.

- (c) Service of process of the application under subsection § 1.52(a) on the corporation may be made in any manner provided by statute of this state or by rule of the applicable court 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.
- (d) 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, shall be brought within 120 days of the validation effective time.

CROSS-REFERENCES

“Beneficial shareholder” defined, see § 1.40.

“Shareholder” defined, see § 1.40.

“Unrestricted voting trust beneficial owner” defined, see § 1.40.

OFFICIAL COMMENT

Section 1.52 confers plenary jurisdiction on a designated court to hear and determine claims regarding the validity of any corporate action or any shares, rights, options or warrants. The court’s jurisdiction is not limited to reviewing corporate actions ratified or purportedly ratified under section 1.47, and includes the ability of a corporation or other permitted person to obtain a declaration regarding the validity of any corporate actions or shares that are potentially defective. In determining the validity of a corporate action or reviewing a corporate action ratified under section 1.47, the court may consider any factors or considerations it deems proper under the circumstances. These might include whether the person originally taking the defective corporate action believed that the action complied with corporate requirements, whether the corporation and board of directors has treated the defective corporate action as a valid action, whether any person has acted in reliance on the public record that such defective corporate action was valid and whether any person will be or was harmed by the ratification of the defective corporate action or will be harmed by the failure to ratify or validate the defective corporate action