Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other Corporate Acts

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In 2008, this journal published an article noting the difficulty under Delaware law in determining whether defects in stock issuances would render the stock void, and thus incapable of being validated or ratified, or merely voidable, and thus susceptible to cure by ratification. The Delaware legislature has adopted amendments to the General Corporation Law of the State of Delaware, which amendments will become effective on April 1, 2014, that are designed to overrule the existing precedents requiring that defective stock and acts be found void. The amendments expressly provide that defects in stock issuances and other acts render such stock and acts voidable and not void, if ratified or validated in accordance with the new ratification statutes. The amendments provide Delaware corporations with two alternative paths—one involving remedial action taken at the corporation's initiative, the other involving a court proceeding—to ratify or validate stock and other corporate acts that, due to a defect in authorization, might under prior law have been void and incapable of ratification. In this article, we summarize the reasons why the ratification statutes were necessary, provide an overview of the new Delaware ratification statutes, and discuss examples of circumstances where the ratification statutes could be utilized, specific types of defects that could be validated, which alternative path (self-help or court-assisted) might be appropriate in various circumstances, and the effect of validation.

In 2008, this journal published an article noting the difficulty under Delaware law in determining whether defects in stock issuances would render the stock void, and thus incapable of being validated or ratified, or merely voidable, and thus susceptible to cure by ratification.[1] The article proposed that the Delaware courts apply the policy underlying Article 8 of the Delaware Uniform Commercial Code (the "Delaware UCC") to permit overissued stock to be cured by a subsequent amendment to the issuer's certificate of incorporation, and stock held by innocent purchasers for value to be treated as valid regardless of whether the

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1. C. Stephen Bigler & Seth Barrett Tillman, *Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law*, 63 BUS. LAW. 1109 (2008) [hereinafter *Void or Voidable*].

stock had been defectively issued.[2] The Delaware Court of Chancery, however, did not adopt that approach,[3] and in the ensuing years issued several opinions finding or indicating that existing Delaware Supreme Court precedent required it to find stock that was defectively issued void, despite the difficult consequences to all concerned.[4]

To address this issue, the Delaware legislature has adopted amendments to the General Corporation Law of the State of Delaware ("DGCL"), effective on April 1, 2014, that are designed to overrule the existing precedents requiring that defective stock and acts be found void.[5] The amendments expressly provide that defects in stock issuances and other acts render such stock and acts voidable and not void, and provide Delaware corporations with two alternative paths to validate stock and other corporate acts that, due to a defect in authorization, might under prior law have been void and incapable of ratification.[6]

In this article, we summarize the reasons why the ratification statutes were necessary, primarily to provide a framework to explain the types of defects those statutes are intended to address. We then provide an overview of the new Delaware ratification statutes. Finally, we conclude by describing the manner in which the ratification statutes are intended to operate, give examples of circumstances where the ratification statutes could be utilized and specific types of defects that could be validated, which alternative path (self-help or court-assisted) might be appropriate in various circumstances, and the effect of validation.

I. Why Are the Ratification Statutes Necessary?

Before summarizing the ratification statutes, it is important to review the reasons underlying their adoption. As noted in *Void or Voidable*:

> In a number of leading cases, the Delaware Supreme Court has treated the statutory formalities for the issuance of stock as substantive prerequisites to the validity of the

2. *Id.* at 1148–51 ("In conclusion, we suggest that the policy underlying the [Delaware Uniform Commercial Code] to validate stock, notwithstanding technical defects in its issuance, in the hands of innocent purchasers for value should be recognized as a principle of law, not solely as a principle of equity, and should be applied by the Delaware courts as such.").

3. *See* Transcript of the Chancellor's Ruling on Plaintiffs' Motion for Default Judgment and Intervenor's Motion for Attorneys' Fees and Costs at 12–13, Noe v. Kropf, C.A. No. 4050-CC (Del. Ch. Jan. 15, 2009).

4. *See, e.g.*, Olson v. ev3, Inc., C.A. No. 5583-VCL, 2011 WL 704409, at *7 (Del. Ch. Feb. 21, 2011); Blades v. Wisehart, C.A. No. 5317-VCS, 2010 WL 4638603, at *12 (Del. Ch. Nov. 17, 2010).

5. 79 Del. Laws ch. 72 (2013) (enacting new sections 204 and 205 of the DGCL, which are referred to herein as the "ratification statutes"). Although amendments to the DGCL typically become effective on August 1 of the year in which they are enacted, the effectiveness of the ratification statutes was delayed until April 1, 2014 to give the Delaware Secretary of State additional time to update its processing systems to accommodate the "certificate of validation" that, in certain cases, must be filed in connection with a ratification under new section 204 of the DGCL. *See* William J. Haubert, John Mark Zeberkiewicz & Brigitte V. Fresco, *Significant Proposed Amendments to the General Corporation Law of the State of Delaware* Insights, June 2013, at 27. Because the ratification statutes are principally intended to address defects in stock and stock issuances, they do not apply to nonstock corporations. *See* Del. Code Ann. tit. 8, § 114(b)(2) (West, Westlaw through 79 Laws 2013, chs. 1–185).

6. Del. Code Ann. tit. 8, §§ 204, 205 (West, Westlaw through 79 Laws 2013, chs. 1–185).

> stock being issued, and the court has determined that failure to comply with such formalities renders the stock in question void. A finding that stock is void means that defects in it cannot be cured, whether by ratification or otherwise. Thus, practitioners finding defects in stock issuances are put in the uncomfortable position of having to make a judgment whether the defect is one that renders the stock void, in which case ratification is not an option, or voidable, in which case ratification is an option.[7]

Since that time, the Delaware courts have continued to apply the legal analysis articulated by the Delaware Supreme Court in *STAAR Surgical Co. v. Waggoner*[8] in analyzing the validity of stock, and have issued several additional opinions finding corporate stock to be void, based in part on the principle that equity is powerless in the face of defective stock issuances.[9] The Delaware Court of Chancery relied on this principle in *Blades v. Wisehart*.[10] As with many of the cases addressing the validity of stock issuances, the court's holding in *Blades* was issued in the context of a so-called section 225 action[11]—in this case, a control dispute over Global Launch, Inc., an upstart "internet layaway" company.[12] Global Launch had been organized by, and owed its capital structure largely to, an attorney who was apparently unfamiliar with certain technical procedures under the DGCL.[13] The opinion catalogues many of the non-compliant acts, but the principal defect giving rise to the court's key holding arose from Global Launch's ill-fated attempt to effect a five-for-one forward stock split, the apparent purpose of which was to increase the number of shares available for sale to investors and for distribution to employees as compensation.[14] Global Launch's board of directors approved an amendment to the certificate of incorporation in

7. *Void or Voidable*, *supra* note 1, at 1110 (footnotes omitted).

8. 588 A.2d 1130, 1137 (Del. 1991). The Delaware Supreme Court in *STAAR* held that because the "issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise," strict compliance with technical procedures must be observed. *Id.* at 1136.

9. *See Blades*, 2010 WL 4638603, at *12 ("But what is more critical is that *STAAR* and other binding precedent make clear that I cannot ignore the statutory infirmity of the stock split because my equitable heartstrings have been plucked. That is, in the sensitive and important area of the capital structure of the firm, law trumps equity." (footnote omitted)); *see also In re* Native Am. Energy Grp., Inc., C.A. No. 6358-VCL, 2011 WL 1900142, at *6 (Del. Ch. May 19, 2011) ("The Delaware Supreme Court refused to 'trivialize' compliance with the statutory requirements by invoking equitable considerations and 'emphasize[d] that our courts must act with caution and restraint when granting equitable relief in derogation of established principles of corporate law.'" (citations omitted)). Of course, equity may trump law in the case where stock is validly issued under the DGCL to insiders or through some other breach of fiduciary duty. *See* Johnston v. Pedersen, 28 A.3d 1079, 1092 (Del. Ch. 2011) ("Because the defendants adopted the class vote provision in breach of their duty of loyalty, the holders of the Series B Preferred are not entitled to a class vote in connection with the removal of the incumbent board and the election of a new slate by written consent.").

10. *Blades*, 2010 WL 4638603, at *10–12.

11. *See, e.g.*, *id.*; Reddy v. MBKS Co., 945 A.2d 1080 (Del. 2008); Noe v. Kropf, C.A. No. 4050-CC, 2008 WL 4603577 (Del. Ch. Oct. 15, 2008); Superwire.com, Inc. v. Hampton, 805 A.2d 904 (Del. Ch. 2002); Kalageorgi v. Victor Kamkin, Inc., 750 A.2d 531 (Del. Ch. 1999), *aff'd*, 748 A.2d 913 (Del. 2000) (TABLE).

12. *Blades*, 2010 WL 4638603, at *2.

13. *Id.*

14. *Id.* at *3.

connection with the proposed split, but the certificate of amendment was not filed until months after the split had purportedly occurred.[15] In addition, that amendment failed to include language effecting the stock split; all it did was increase the number of authorized shares.[16]

A few months later, Rusty Blades, one of Global Launch's founders and directors, pled guilty to a misdemeanor and resigned from his positions at the company.[17] While Blades was away from the company, Global Launch's counsel made a number of share "transfers," including of the post-split shares that were purportedly held by Blades, to employees and other investors.[18] Later, Blades reemerged, launching an attempt to regain control of Global Launch. Competing factions took actions to elect directors.[19] Litigation ensued, the principal focus of which became whether the shares purportedly issued in the split were validly issued and therefore capable of being voted. The court declared those shares invalid, reasoning that Global Launch had failed to follow the precise steps required by section 242 of the DGCL to amend its certificate of incorporation to implement a valid stock split. Because the amendment purporting to implement the split was defective from a technical standpoint, the shares purportedly issued in that split were void.[20]

Not long after *Blades*, the Delaware Court of Chancery in *Olson v. ev3, Inc.* revisited the "void stock" issue—this time in the context of a settlement hearing.[21] In *ev3*, a stockholder plaintiff challenged the use of a so-called "top-up option" designed to facilitate the acquisition of ev3.[22] The basic terms of the transaction were as follows. Covidien Group S.a.r.l. launched a tender offer to purchase all of ev3's outstanding shares.[23] Upon obtaining a minimum number of shares in the tender offer, Covidien and ev3 were required to effect a back-end merger, in which all of the ev3 shares not submitted in the tender offer would be cashed out at the tender offer price.[24] Depending on the number of shares purchased in the

15. *Id.*

16. *Id.* at *8–9. As noted by the Court in *Blades*: "A stock split is a means by which a corporation changes the number of outstanding shares by either dividing the existing number of outstanding shares by a specified number (a reverse stock split), or multiplying the existing number of outstanding shares by a specified multiplier (a forward stock split). Although there is no express use of the term 'stock split' in the [DGCL], § 242(a)(3) of the DGCL provides that 'a corporation may amend its certificate of incorporation, from time to time, so as . . . [t]o . . . subdivid[e] or combin[e] the outstanding shares of any class or series of a class of shares into a greater or lesser number of outstanding shares . . . .' Thus, in order to effect a forward or reverse stock split, the corporation must follow the prescribed corporate formalities to amend its certificate of incorporation in such a manner that 'splits' the outstanding shares in accordance with the corporation's intentions." *Id.* at *8 (alterations in original) (footnotes omitted).

17. *Id.* at *4.

18. *Id.*

19. *Id.* at *5–6.

20. *Id.* at *12 ("The stock purportedly held by minority stockholders, having never been properly authorized through a valid stock split, is, to borrow a phrase from *STAAR*, 'void and a nullity.'" (citing STAAR Surgical Co. v. Waggoner, 588 A.2d 1130, 1136 (Del. 1991)).

21. C.A. No. 5583-VCL, 2011 WL 704409 (Del. Ch. Feb. 21, 2011).

22. *Id.* at *1.

23. *Id.* at *3.

24. *Id.*

offer, Covidien had the right to exercise a top-up option to purchase directly from ev3 additional shares of stock such that it would own 90 percent of ev3's outstanding common stock, thus permitting it to consummate a "short-form" merger under section 253 of the DGCL.[25] One of the plaintiff's arguments against the top-up option was that it failed to comply with sections 152, 153, and 157 of the DGCL.[26]

In granting plaintiff's initial motion to expedite, the court found that plaintiff had advanced a "strong claim" that the top-up option violated those statutes.[27] After the claims had been settled, in considering the amount of the plaintiff's attorney's fee award, the court addressed the "benefit" that plaintiff had conferred on ev3 and its stockholders by addressing (and presumably causing to be cured) the statutory defects associated with the top-up option. "As originally structured in the Merger Agreement," the court stated, "the Top-Up Option and any shares issued upon its exercise likely were void."[28] That finding was based on the notion that section 157(b) of the DGCL, which relates to the creation and issuance of stock options, requires that the instrument evidencing the option set forth the consideration for the option or a formula to determine it; such instrument (in this case, the merger agreement) lacked sufficient specificity regarding the terms of the promissory note that would be furnished as consideration; and because there was not sufficient specificity, the court found, one could infer that the board did not adopt a valid resolution authorizing the option or the underlying shares.[29]

Although the Delaware Supreme Court's holding in *STAAR*, which was followed in cases like *Blades* and *ev3*, was based in part on the premise that the capital structure of a Delaware corporation is so fundamental that it may only be set with the type of precision that comes from adherence to statutory formalities,[30]

25. *Id.* at *4–6.

26. *Id.* at *6.

27. *Id.* at *7.

28. *Id.* at *11. In making this observation, the Court of Chancery highlighted the house-of-cards nature of void acts: "To the extent a short-form merger closed in reliance on the resulting shares, the validity of the Merger could be attacked. The invalidity of that transaction in turn could have called into question subsequent acts by the surviving corporation. By defusing a potential corporate landmine, Olson and her counsel conferred an unquantifiable but nevertheless significant corporate benefit on ev3 and its stockholders—and on Covidien and its stockholders as well." *Id.*

29. *Id.* at *12.

30. *See* STAAR Surgical Co. v. Waggoner, 588 A.2d 1130, 1136 (Del. 1991) (stating that the "law properly requires certainty" in the creation and issuance of capital stock); *see also* Blades v. Wisehart, C.A. No. 5317-VCS, 2010 WL 4638603, at *12 (Del. Ch. Nov. 17, 2010) (noting that "in the sensitive and important area of the capital structure of the firm, law trumps equity"); *ev3*, 2011 WL 704409, at *14 (stating "[a] brief statutory violation is nonetheless a statutory violation" and noting that the Delaware Supreme Court, in *STAAR*, "rejected a similar attempt to 'trivialize' the requirements for issuing stock as 'mere technicalities'"); Liebermann v. Frangiosa, 844 A.2d 992, 1004–05 (Del. Ch. 2002). In *Kalageorgi v. Victor Kamkin, Inc.*, however, the court, while articulating the same policy considerations underpinning the need to adhere to statutory formalities, reached a different outcome. 750 A.2d 531 (Del. Ch. 1999), *aff'd*, 748 A.2d 913 (Del. 2000) (TABLE). The *Kalageorgi* court stated: "Corporate securities are a species of property right that represent not only a firm's fundamental source for raising capital, but also now a publicly traded commodity that is a critical component for creating both institutional and individual wealth that may affect the economic

the opinion extended the principle to corporate acts generally.[31] Indeed, the basic concept articulated in *STAAR* has not been limited to equity issuances. In *Tansey v. Trade Show News Networks, Inc.*, for example, the Court of Chancery indicated that a merger authorized in contravention of section 251 would be void.[32] The court noted the various defects in the authorization process. The merger agreement was executed *after* it was adopted by stockholders (and, therefore, the authorizing events did not occur in the statutory sequence specified by section 251).[33] In addition, the target corporation's board never duly approved the merger agreement. While they purported to do so by unanimous written consent of directors, one of the directors failed to execute the consent.[34] The court found that the defendants, by engaging in the invalid merger, had effected an improper "conversion" of plaintiff's shares.[35]

In addition, it is not just non-compliance with statutory formalities that has given rise to invalidity concerns.[36] In *Sanders v. Wang*, the Delaware Court of Chancery invalidated options issued in violation of a stockholder-approved

well-being of entire societies. Given the foundational importance of such securities to our economic system, it is critical that the validity of those securities, especially those that are widely traded, not be easily or capriciously called into question. Otherwise, the resulting economic uncertainty to investors and institutions that relied upon the integrity of those securities would be destabilizing. Accordingly, our statutory scheme, elucidated by case law, has developed a clear and easily followed legal roadmap for creating these valuable instruments that represent claims upon an enterprise's capital. Under that model, if that roadmap is followed, the investment community will be assured that the corporate securities created by that process will not be vulnerable to legal attack." *Id.* at 538. But the Court of Chancery stated that if that roadmap were not followed, "then the securities will become subject to *possible* invalidation." *Id.* (emphasis added). That is, the court did not state that the securities would be void *ab initio*; instead, they *could* be found invalid. In fact, the court declined the invitation to invalidate the stock at issue, noting that it was faced with a "counterexample" of the situation in which "the imperatives of law and the demands of equity pull in the same direction." *Id.* at 537. While recognizing that there was no formal evidence (either minutes or a unanimous written consent) of the board's authorization of the shares, the court found, "as a factual matter, the defendants' pattern of conduct" following the purported issuance was sufficiently convincing to enable the court to conclude that the appropriate parties had intended the issuance to occur. *Id.* at 539. "That being the case, it is hardly frivolous for defendants to argue that to invalidate their stock for purely formalistic reasons would defeat not only the board's clear intent but also the purpose of the formal requirements themselves, which is to create indisputable evidence that the board intended to authorize the issuance of the securities." *Id.*

31. *STAAR*, 588 A.2d at 1137 n.2 (emphasizing that the Delaware courts "must act with caution and restraint when granting equitable relief in derogation of established principles of corporate law").

32. C.A. No. 18796, 2001 WL 1526306, at *4 (Del. Ch. Nov. 27, 2001).

33. *Id.*

34. *Id.*

35. *Id.* at *6. The *Tansey* court cited the following definition of conversion: "Conversion is an 'act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it.' A stockholder's shares are converted by 'any act of control or dominion . . . without the [stockholder's] authority or consent, and in disregard, violation, or denial of his rights as a stockholder of the company.'" *Id.* (alterations in original) (internal citations omitted) (quoting Arnold v. Soc'y for Savings Bancorp, Inc., 678 A.2d 533, 536 (Del. 1996)).

36. *See* Klaassen v. Allegro Dev. Corp., C.A. No. 8626-VCL, 2013 WL 5739680, at *19 n.10 (Del. Ch. Oct. 11, 2013) ("The line I have drawn between a lack of notice [of a board meeting] that contravenes formal requirements in the constitutive corporate documents (where the meeting and related actions are void and not subject to equitable defenses) and a lack of notice that is deemed inconsistent with general principles of equity (where the meeting and related actions are voidable and subject to equitable defenses) is the best I can do to harmonize the [Delaware] decisions into a workable rule.").

stock ownership plan.[37] In *Sanders*, stockholders of Computer Associates International, Inc. challenged the grant of shares of common stock to certain key executives under the company's key employee stock ownership plan, claiming that the grant violated the provision of the plan establishing an upper limit on the number of shares authorized thereunder.[38] The defendants argued that a separate provision of the plan—the provision enabling the compensation committee to interpret and administer the plan—authorized the grant of the excess shares, notwithstanding the stated limit, and that, based on that interpretative authority, they were entitled to make the adjustments to awards to give effect to the company's recent forward stock split.[39] The court disagreed, finding that the committee's role was "ministerial in nature" and that the provision relied on by the defendants did not permit the committee "to alter materially the numerical limit (the share ceiling)."[40] When addressing the validity of the grant, the court focused on several key facts, including that the grants were excessive (in the court's view)[41] and that the stockholders had relied on the plan's upper limit when approving it.[42]

Finding that the grant was not validly authorized under the plan, the court entered judgment entitling the plaintiffs to cancellation or rescission of 9.5 million shares granted in violation of the share limit established by the plan.[43] Although the court was not asked to address whether the defective grant was susceptible to cure by ratification, its decision to cancel or rescind the invalidly authorized shares essentially foreclosed that possibility, suggesting that ratification would not have cured the defect.

The consequences of finding stock or a corporate act "void" are troublesome, and often disproportionate to the often inadvertent defect resulting in that finding.[44] As noted by the Court of Chancery in *Blades v. Wisehart*:

> The fact that now Blades and The Ohio Company have sole control of Global Launch may not be the cause for celebration they may have anticipated at the outset of this litigation. . . . To make matters worse, as Blades acknowledged at trial, there are nearly fifty minority stockholders listed on the stock ledger who hold invalid

37. C.A. No. 16640, 1999 WL 1044880, at *12 (Del. Ch. Nov. 8, 1999).
38. *Id.* at *1.
39. *Id.* at *3.
40. *Id.* at *9.
41. *Id.* at *7 ("As a practical matter, my rough calculations indicate that even under the strictest reading of the Plan, the three Participants will together still receive nearly $320 million. $320 million is no mere bagatelle. I find it remarkable that defendants would have me believe that CA's shareholders would consider that $320 million for three individuals failed to 'encourage, recognize, and reward sustained outstanding individual performance by certain key employees.'").
42. The court also noted that, while other of Computer Associates' equity award plans included language allowing for adjustments, the plan at issue did not. *Id.* at *12.
43. *Id.*
44. *See* Transcript on the Motion to Dismiss Counterclaim at 68, Langdale Int'l Res., LLC v. Arye Berest, C.A. No. 8070-CS (Del. Ch. Mar. 26, 2013) (stating that the word "invalid" is not one parties generally "should be using in equity" and that it should not be used "lightly," as a finding of invalidity could give rise to an action for damages or other remedies, and the ensuing litigation could be protracted).

> Global Launch share certificates Wetzel sent them, some of whom Blades reached out to in preparation for his ineffective stockholders meeting in November, 2009.
>
> A similar situation was encountered in the *Liebermann* case, where the defendant directors had participated in the creation and sale of preferred stock to outside investors that was never properly authorized in the corporation's certificate of incorporation, but defended their use of a written consent to remove incumbent board members on the ground that the consents represented a majority of the *validly issued* common stock. This court, in upholding the written consent and the defendants' argument with respect to the invalidly issued preferred stock, noted the Pyrrhic nature of the victory:
>
> > Although it might be galling to the plaintiffs to have Frangiosa and D'Ambrosio take advantage of a legal problem they contributed to creating, the inequity that results is no greater than that which occurred in *STAAR*, wherein a purchaser who had accepted substantial economic risk in exchange for shares was denied the benefits of the bargain he thought he made by the company with whom he had made it. . . . Even more critical, my recognition of the New Board as the proper board of MobileToys does not leave the investors [holding the invalid preferred stock] without a remedy. . . . Frangiosa and D'Ambrosio will now bear primary responsibility for directing MobileToys' response to this substantial legal problem, which exposes the company (and perhaps its directors) to rather obvious claims (*e.g.*, for equitable rescission or unjust enrichment). Another court on another day may well confront disputes arising out of the New Board's decisions, if it is unable to address the purchasers' concerns in a manner that generates consensus.
>
> Global Launch and its newly elected directors will face the same difficult situation. They will have to address various claims by investors, employees, the defendants, and others if they do not straighten out the situation fairly.[45]

Given that the Court of Chancery, due to *STAAR* and other binding precedent, has found it is incapable of curing stock and other acts suffering from defects in authorization notwithstanding the equitable consequences, corporations and their counsel, when faced with questions over validity, often have few practical options. As noted in *Void or Voidable*, the Delaware UCC takes the approach that treating the stock as valid in the hands of a purchaser for value is often the best remedy, since it places parties in the position they believed they occupied.[46] Any other remedy, particularly for a public company, could effectively plunge the company into chaos.[47] Unfortunately, the Court of Chancery found it was re-

45. Blades v. Wisehart, C.A. No. 5317-VCS, 2010 WL 4638603, at *12–13 (Del. Ch. Nov. 17, 2010) (alterations in original) (footnotes omitted).

46. *Void or Voidable*, *supra* note 1, at 1144–48.

47. Based on its public filings, Vitacost.com, Inc., upon discovering potential defects in its capital structure due to non-compliance with Delaware corporate law, was evidently forced to consider drastic measures to remedy the defects, including a possible reorganization under chapter 11 of the U.S. Bankruptcy Code. On November 15, 2010, Vitacost issued a press release announcing that its audit committee, with the assistance of outside advisors and consultants, was undertaking an internal review of certain of the valuation methods used in stock-based compensation grants and awards and other matters. *See* Vitacost.com, Inc., Current Report (Form 8-K), at 1 (Nov. 15, 2010). Less than a month later, Vitacost announced that its audit committee, together with its advisors, had uncovered "potential defects in the Company's corporate organizational and formation documents and certain

quired to treat the stock as void.[48] This conclusion prevented the court from giving effect to the relevant provisions of the Delaware UCC designed to validate defective stock in the hands of a purchaser for value.[49] Accordingly, legislative intervention was necessary to resolve the statutory inconsistency and to otherwise address this issue.[50]

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corporate transactions that may not have been authorized in accordance with all requirements of applicable Delaware corporate law, including, without limitation, certain stock splits and stock option and other stock issuance transactions effected both prior to and in connection with [Vitacost's initial public offering]." Vitacost.com, Inc., Current Report (Form 8-K), at 1 (Dec. 8, 2010). As a result, Vitacost stated, "questions have arisen regarding the validity of such stock issuance transactions and the potential impact of such invalidity on the Company's equity capitalization." *Id.* Vitacost noted that its board of directors, its audit committee, and its management team were working with outside advisors to find a solution to remedy the defects, including "a state judicial proceeding or the commencement of a prepackaged Chapter 11 reorganization of the Company's equity structure." *Id.*

Roughly six months later, Vitacost announced the manner in which the "potential defects" had been resolved. In connection with the settlement of a pending derivative suit in the Circuit Court of the Fifteenth Judicial District, Palm Beach County, Florida, Vitacost had requested that the court enter an order recognizing and quieting title to Vitacost's outstanding shares and options during a specified period. *See* Vitacost.com, Inc., Quarterly Report (Form 10-Q), Explanatory Note (June 16, 2011). Vitacost announced that the court had issued an order approving the settlement and quieting title to such shares and options "pursuant to the inherent equitable powers of the Court and the Uniform Commercial Code." *Id.*

48. Section 201 of the DGCL provides that stock transfers are governed by the Delaware UCC, except as otherwise provided by the DGCL. DEL. CODE ANN. tit. 8, § 201 (West, Westlaw through 79 Laws 2013, chs. 1–185) ("Except as otherwise provided in [the DGCL], the transfer of stock and the certificates of stock which represent the stock or uncertificated stock shall be governed by Article 8 of subtitle I of Title 6 [i.e., the Delaware UCC]. To the extent that any provision of this chapter is inconsistent with any provision of subtitle I of Title 6, [the DGCL] shall be controlling."). In the Transcript of the Chancellor's Ruling on Plaintiffs' Motion for Default Judgment and Intervenor's Motion for Attorneys' Fees and Costs at 12–13, Noe v. Kropf, C.A. No. 4050-CC (Del. Ch. Jan. 15, 2009), then-Chancellor Chandler stated: "I need not reach the issue of whether Turnaround meets the standard as a protected purchaser under Section 8-202 [of the Delaware UCC]" since the shares issued to Turnaround "were void ab initio, meaning they were invalid when they were issued." The then-chancellor also stated: "[any] action taken where authority is lacking will constitute more than a mere defect as contemplated by Section 8-201(b)(1) [of the Delaware UCC]." *Id.* at 13. Because Turnaround "purchased shares that in effect never existed," it was "not entitled to any protection under the [Delaware UCC]." *Id.*

49. *Id.*

50. In an opinion released after the enactment of sections 204 and 205 of the DGCL, but before their effectiveness, the Court of Chancery, in addressing the validity of various stock issuances in connection with an action brought under section 225, indicated that the ratification statutes were necessary to empower the Court to use its equitable power to remediate defects resulting from non-compliance with statutory requirements. *See* Boris v. Schaheen, C.A. No. 8160-VCN, 2013 WL 6331287 (Del. Ch. Dec. 2, 2013). The Court in *Boris* found that stock issued without any written instrument was void because the purported issuance failed to comply with section 151(a) of the DGCL. *Id.* at *14. Nevertheless, in reaching its conclusion, the court stated: "This memorandum opinion seeks to reflect, and to apply, current Delaware law. But, 'our corporate law is not static.' Indeed, the Delaware General Assembly regularly amends the DGCL. The Court is cognizant that the most recent DGCL amendments—Sections 204 and 205—will influence this Court's analysis of future disputes involving stock that was not issued pursuant to a written instrument evidencing board approval." *Id.* at *13 n.168 (internal citations and quotes omitted). Similarly, in *Klaassen v. Allegro Development Corp.*, the court stated: "In light of the difficulties created by the doctrine of incurable voidness, the General Assembly recently amended the DGCL to establish a statutory procedure by which this court could establish the validity of otherwise void corporate acts. *See* 8 *Del. C.* § 204." C.A. No. 8626-VCL, 2013 WL 5739680, at *15 (Del. Ch. Oct. 11, 2013).

II. Summary of the Ratification Statutes

The ratification statutes set forth two principal methods of validating defective corporate acts. The first, included in section 204 of the DGCL, is a "self-help" provision that allows the board of directors, by following specified procedures, to validate a defective corporate act. The second, included in section 205 of the DGCL, requires the corporation or certain parties acting on its behalf to petition the Delaware Court of Chancery to enter an order validating or invalidating, as the case may be, the defective act.

A. Section 204: The Self-Help Provision

While the intricacies of section 204 are detailed below, the basic structure of the statute is simple. First, the statute reverses the holding in *STAAR* and provides that defective stock and defective corporate acts are not void but are voidable and may be ratified. Second, the statute provides a ratification procedure that, if followed, will result in ratification of the defective act and any stock issued pursuant to the defective corporate act, retroactive to the date the defective corporate act was originally taken or the stock originally issued, thereby curing not only the defective stock or act but also resolving the "domino effect" of such defect on subsequent corporate acts potentially resulting from a defective corporate act taken in the past.

1. Section 204(a): The Basic Policy

The keystone of section 204 is the provision that "no defective corporate act or putative stock shall be void or voidable solely as a result of a failure of authorization" if it is ratified in accordance with the procedures set forth in section 204 or is validated by the Delaware Court of Chancery in a proceeding under section 205.[51] Section 204(a), therefore, legislatively overturns the holdings in *STAAR, Tansey*, *Blades*, and other cases that stock issued or acts taken in contravention of the DGCL are void and not voidable and thus not susceptible to ratification or validation on equitable grounds or otherwise.

The definitions for the terms used in section 204(a) are set forth in section 204(h). The term "defective corporate act" is defined broadly to mean

> an overissue, an election or appointment of directors that is void or voidable due to a failure of authorization, or any act or transaction purportedly taken by or on behalf of the corporation that is, and at the time such act or transaction was purportedly taken would have been, within the power of a corporation under [sections 121

51. Del. Code Ann. tit. 8, § 204(a) (West, Westlaw through 79 Laws 2013, chs. 1–185). The synopsis to House Bill 127 states: "[Section] 204 is intended to overturn the holdings in case law, such as *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991) and *Blades v. Wisehart*, 2010 WL 4638603 (Del. Ch. Nov. 17, 2010), that corporate acts or transactions and stock found to be 'void' due to a failure to comply with the applicable provisions of the General Corporation Law or the corporation's organizational documents may not be ratified or otherwise validated on equitable grounds." H.B. 127, 147th Gen. Assemb., Reg. Sess. (Del. 2013).

> through 127 of the DGCL, which deal with the general and specific powers granted to Delaware corporations, and the specific limits on those powers], but is void or voidable due to a failure of authorization.[52]

The definition includes overissues of stock, as well as any election or appointment of directors and any act or transaction within the general powers of a corporation that has not been properly authorized. Embedded within the definition of defective corporate act is the premise that an act, albeit defective, had occurred. Thus, section 204 implicitly preserves the common law rule that ratification operates to give original authority to an act that was taken without proper authorization,[53] but may not be used to authorize retroactively an act that was never taken but that the corporation now wishes had occurred, or to "backdate" an act that did occur but that the corporation wishes had occurred as of an earlier date.[54]

The first category of defects, "overissues," is the subject of a separate definition. Under section 204(h), the term "overissue" is defined to mean either an issuance (1) in excess of the number of shares of any class or series that a corporation then has the power to issue under section 161 of the DGCL, or (2) of shares of any class or series of capital stock that is not then authorized for issuance by the certificate of incorporation.[55] The first part of the definition is focused on issuances beyond those permitted under section 161 of the DGCL, which provides:

> The directors may, at any time and from time to time, if all of the shares of capital stock which the corporation is authorized by its certificate of incorporation to issue have not been issued, subscribed for, or otherwise committed to be issued, issue or take subscriptions for additional shares of its capital stock up to the amount authorized in its certificate of incorporation.[56]

In common parlance, an overissue is most frequently thought to occur where the corporation has effected a stock issuance such that the number of shares of a class or series of stock outstanding after the issuance exceeds the number of shares of the class or series that the corporation is authorized to issue under its certificate of incorporation. That is not the only circumstance, however, in which an overissue may occur. By its terms, section 161 limits the directors'

52. DEL. CODE ANN. tit. 8, § 204(h)(1) (West, Westlaw through 79 Laws 2013, chs. 1–185).

53. *See* Hannigan v. Italo Petroleum Corp. of Am., 47 A.2d 169, 173 (Del. 1945) ("'[t]he effect of a subsequent ratification is that it relates back and gives validity to the unauthorized act or contract, as of the date when it was made and affirms it in all respects as though it had been originally authorized. The act is legalized from its inception.'" (citation omitted)).

54. In *Liberis v. Europa Cruises Corp.*, C.A. No. 13103, 1996 WL 73567, at *8 (Del. Ch. Feb. 8, 1996), *aff'd*, 702 A.2d 926 (Del. 1997) (TABLE), the court stated that "the complete absence of board action is not an irregularity correctable by routine ratification" and, on that basis, found that the "purported authorization [of stock options] was void, not voidable." *Liberis*, however, must be contrasted with other cases in which the board of directors has endorsed actions that were in fact taken by or on behalf of the corporation, albeit without proper authorization, and subsequently ratified. *See, e.g.*, Apple Computer, Inc. v. Exponential Tech., Inc., C.A. No. 16315, 1999 WL 39547, at *7 (Del. Ch. Jan. 21, 1999); Adams v. Calvarese Farms Maint. Corp., C.A. No. 4262-VCP, 2010 WL 3944961, at *8 (Del. Ch. Sept. 17, 2010).

55. *See* DEL. CODE ANN. tit. 8, § 204(h)(3) (West, Westlaw through 79 Laws 2013, chs. 1–185).

56. *Id.* § 161.

power not only with respect to the number of shares issued up to the cap in the certificate of incorporation, but also to the shares subscribed for or committed for issuance. For example, a corporation with 100 shares of common stock authorized under its certificate of incorporation and only fifty shares of common stock outstanding would effect an overissue by the issuance of a single share of common stock if, at the time of the issuance, fifty of the shares were subject to stock subscription agreements and an additional twenty-five were irrevocably committed for issuance under the terms of a warrant. In addition, although the term "overissue" seems to connote an issuance in excess of the number of shares authorized for issuance, it is drafted expansively to include issuances of any class or series of stock that are not, at the time of the purported issuance, authorized for issuance under the certificate of incorporation. A not uncommon example of this second type of overissue occurs where the corporation issues a series of preferred stock to a new investor but neglects to file the certificate of designation creating and authorizing the series prior to or contemporaneously with the issuance.

The second category of defects, elections or appointment of directors or acts within the corporation's powers that were not properly authorized, must be analyzed by reference to the definition of "failure of authorization," which may generally be thought of as the defect giving rise to the need for ratification. Section 204(h) defines the term "failure of authorization" to mean

> the failure to authorize or effect an act or transaction in compliance with the provisions of this title, the certificate of incorporation or bylaws of the corporation, or any plan or agreement to which the corporation is a party, if and to the extent such failure would render such act or transaction void or voidable.[57]

Thus, the statute addresses non-compliance with the DGCL (as was the case in *Blades*), non-compliance with the certificate of incorporation or bylaws (as was the case, in some respects, in *STAAR*),[58] and non-compliance with a plan that would render an act or transaction void or voidable (as was the case in *Sanders*).[59]

57. *Id.* § 204(h)(2).

58. *Cf.* Fletcher Int'l, Ltd. v. ION Geophysical Corp., C.A. No. 5109-VCP, 2010 WL 1223782, at *1–2 (Del. Ch. Mar. 24, 2010) (declining to invalidate a note issued by a subsidiary of the parent corporation, despite finding that the note had been issued in violation of a provision of the parent corporation's certificate of incorporation requiring the consent of the preferred stockholders to effect the issuance).

59. The failure to obtain a contractually required vote will not in every case render the act void or voidable. In *Orban v. Field*, C.A. No. 12820, 1993 WL 547187, at *9 (Del. Ch. Dec. 30, 1993), for example, the plaintiffs claimed that the holders of common stock were deprived of their right to vote as a class on a merger agreement that, by its terms, required 90 percent approval by class to enable the transaction to qualify for "pooling of interests" accounting treatment. The court noted that the plaintiffs did not plead that the certificate of incorporation conferred that right, that the merger agreement did not condition the effectiveness of the merger on the super-majority vote, and that the DGCL confers no such right. *Id.* Stating that the notion of stockholders "having directly enforceable rights as third party beneficiaries to corporate contracts is . . . one that should be resisted," and that even if one were to look through the merger agreement to view the stockholders as third-party beneficiaries, it was not appropriate to do so in the present case, since the stockholders, if anything, "were wholly incidentally 'benefitted' by the Merger Agreement[']s supermajority class vote provision, if that provision is deemed a benefit." *Id.* Accordingly, the court found that the plaintiffs' claim with respect to the 90 percent vote was not one upon which relief could be granted. *Id.*

The specific types of failures that could conceivably arise are too numerous to mention; some of these are identified in Part III below for illustrative purposes.

2. Section 204(b): The Board's Ratifying Resolution

Section 204(b) sets forth the initial step that must be taken to ratify any defective corporate act—the adoption by the board of directors of a resolution identifying the act to be ratified and approving the ratification. One necessary condition to a corporation's use of section 204 is that it have in place a valid board of directors. In most cases, this will not be an issue—even in situations where multiple defects have been uncovered, it is usually the case that a valid board has been or can be elected or appointed. There are, however, certain circumstances that call into question the validity of the entire board of directors. These circumstances usually involve defects in the original organization of the corporation—such as the incorporator's failing to name the initial directors in either the certificate of incorporation or in an incorporator's statement, or naming the wrong individuals as directors—and may often be cured by affidavits from the incorporator or by certificates of correction reciting that the original certificate of incorporation inadvertently omitted or misstated the names and addresses of the initial directors.[60] Where recourse to such measures is not an option and a valid board cannot be identified, the self-help provisions of section 204 cannot be invoked, and persons seeking to validate corporate acts will have to look to the Delaware Court of Chancery, in a proceeding under section 205, for assistance.[61]

Assuming, however, that a valid board is in place, it must adopt a resolution that states: (i) the defective corporate act to be ratified, (ii) the time of the defective corporate act, (iii) if the defective corporate act involved a share issuance, the number and type of shares and the date of issue, (iv) the nature of the failure of authorization, and (v) that the board approves the ratification of the defective corporate act.[62] As with many other provisions of the DGCL,[63] the board may

60. *See* DEL. CODE ANN. tit. 8, § 103(f) (West, Westlaw through 79 Laws 2013, chs. 1–185) ("Whenever any instrument authorized to be filed with the [Delaware] Secretary of State under any provision of this title, has been so filed and is an inaccurate record of the corporate action therein referred to, or was defectively or erroneously executed, sealed or acknowledged, the instrument may be corrected by filing with the [Delaware] Secretary of State a certificate of correction of the instrument which shall be executed, acknowledged and filed in accordance with this section. The certificate of correction shall specify the inaccuracy or defect to be corrected and shall set forth the portion of the instrument in corrected form. . . . An instrument corrected in accordance with this section shall be effective as of the date the original instrument was filed, except as to those persons who are substantially and adversely affected by the correction and as to those persons the instrument as corrected shall be effective from the filing date.").

61. Likewise, a prerequisite to the use of section 204 is that a certificate of incorporation has been filed and the corporation validly exists. Pre-incorporation contracts and acts would have to be ratified under common law. *See, e.g.*, Comm'rs of Lewes v. Breakwater Fisheries Co., 117 A. 823, 829 (Del. Ch. 1922); *In re* Acadia Dairies, 135 A. 846, 848 (Del. Ch. 1927); Am. Legacy Found. v. Lorillard Tobacco Co., 831 A.2d 335, 351 (Del. Ch. 2003).

62. DEL. CODE ANN. tit. 8, § 204(b) (West, Westlaw through 79 Laws 2013, chs. 1–185).

63. *See, e.g.*, *id.* §§ 242, 251.

include in the ratifying resolution a provision permitting it to abandon the ratifying resolution before the "validation effective time," even if the stockholders have adopted the resolution.[64] The term "validation effective time" is defined generally to mean the later of (i) the time at which the board's resolution is adopted by stockholders (or, if no stockholder vote is required, the time at which notice of the board's resolution is given), and (ii) the time at which a certificate of validation (i.e., the certificate that must be filed to ratify any defective corporate act that would have originally required the filing of an instrument with the Delaware Secretary of State) becomes effective.[65]

Due to the potential gap between the date the defective corporate act was originally purportedly taken and the date the ratifying resolution is adopted, section 204(b) sets forth the quorum and voting requirements applicable to the board's adoption of the ratifying resolution.[66] Section 204(b) specifies that the quorum necessary to convene the meeting of the board to adopt the ratifying resolution, and the vote of the board necessary to adopt the resolution, are those that apply at the time the ratifying resolution is adopted.[67] If, however, the certificate of incorporation or bylaws of the corporation, any plan or agreement to which the corporation was a party, or any provision of the DGCL at the time of the defective corporate act would have required a larger number or portion of directors or of specified directors for a quorum to be present or to approve the defective corporate act, the presence or approval of such larger number or portion of such directors or of such specified directors would be required.[68] This provision was intended to serve as a safeguard against using the ratification procedure to circumvent rights that individual stockholders may have negotiated, and to give effect to the reasonable expectations of investors at the time they made their investment decision. Section 204(b) expressly provides, however, that the vote of directors who were elected by the separate vote of the holders of a specified class or series of stock and are no longer in office because such class or series is no longer outstanding is not required.[69] Accordingly, if the defect was due to the failure to obtain the consent of a class or series of stock, or directors elected by a class or series of stock, the consent of that class or series, or of such director, is required in order to ratify the act, unless at the time of ratification there are no shares of the relevant class or series outstanding.

By way of illustration, assume that in 2012, the corporation made restricted stock grants to its senior executive officers. Prior to the grants, the board had approved the awards in "an amount of 15,000 shares to the Chief Executive Officer and in an amount of up to 10,000 shares for each of the Chief Financial

64. *Id.* § 204(b).
65. *Id.* § 204(h)(7).
66. While section 204 specifically addresses the quorum and voting requirements for the board's ratifying resolution, nothing in the statute would prevent the board from adopting the ratifying resolution by unanimous action in lieu of a meeting pursuant to section 141(f) of the General Corporation Law. *Id.* § 141(f).
67. *Id.* § 204(b).
68. *Id.*
69. *Id.*

Officer, Chief Technology Officer, and General Counsel, the exact number to be determined by the Chief Executive Officer." At the time the grants were made, the corporation's bylaws provided that two-thirds of the total number of directors would constitute a quorum and that the affirmative vote of two-thirds of the directors present at a meeting at which a quorum is present is necessary for action by the board. The certificate of incorporation also required the approval of the "Series A Director" (i.e., the director elected exclusively by the holders of the Series A Preferred Stock) to approve any issuance of "junior securities," which would include the shares of common stock underlying the restricted stock awards. In 2014, the board determines that the grants to the Chief Financial Officer, Chief Technology Officer, and General Counsel may be defective in that the precise number of shares was fixed by an officer, rather than the board,[70] and the board therefore decides to ratify the grants. Since the 2012 grants, the board has amended the bylaws to set the quorum and vote required for board action at a majority of the total number of directors. In this case, assuming the Series A Preferred Stock is still outstanding, two-thirds of the total number of directors will be necessary to constitute a quorum for the meeting at which the ratifying resolution is considered, and the vote of two-thirds of the directors present at such meeting (including the Series A Director) will be necessary to adopt the ratifying resolution. If, however, all of the shares of Series A Preferred Stock had been redeemed by the time of such meeting, the vote of the Series A Director would not be required.

In many cases, there will be no change in the quorum and voting requirements applicable to the board action to ratify a defective act. Nevertheless, changes in the board may occur that make obtaining the requisite ratifying approval either impossible or practically impossible. These changes are most likely to occur in the case of corporations that have completed multiple rounds of equity financing since the time of the defective act to be ratified. Using the facts of the preceding hypothetical, assume that the Series A Preferred Stock continues to be outstanding but that as part of a new round of financing, the certificate of incorporation was amended to eliminate the Series A Director and to create a new Series B Director. At the time of the defective corporate act, the vote of a "specified director" (namely, the Series A Director) was required to approve the act. That directorship, however, no longer exists. Thus, unless the corporation reestablishes the "Series A Director," the ratifying resolution cannot be validly authorized under section 204(b).[71] In that case, any action to validate the action must be accomplished through section 205.

Section 204(a) also addresses the "contractual" votes that are often afforded to particular stockholders under stockholders' agreements. Thus, using the hypothetical above, assume that instead of providing for the separate vote of the

70. *See* Grimes v. Alteon, Inc., 804 A.2d 256, 260–61 (Del. 2002).

71. If the board and relevant stockholder constituencies agree, and assuming all provisions of the organizational documents have been addressed, there is nothing that would prohibit the board from expanding the board to re-appoint the Series A Director to the board solely for purposes of voting on the ratification proposal.

Series A Director in the certificate of incorporation, the corporation had entered into a stockholders' agreement stating that, without the vote of the director nominated by ABC Investor, the corporation shall not, among other things, issue junior securities. Assume, further, that at the time of the ratifying resolution, ABC Investor has sold shares of its Series A Preferred Stock below the threshold at which it retained the right to nominate a director, but retained some of its shares. (Alternatively, assume that ABC Investor converted all of its shares of Series A Preferred Stock to common stock, thereby losing the right to nominate a separate Series A Director.) In that case, because ABC Investor is still a stockholder at the time of the ratifying resolution, the vote of the specified director nominated by ABC Investor would be required to approve the defective corporate act. Unless the ABC Investor's directorship is re-established for purposes of the ratification vote, the requisite approval under section 204(b) cannot be obtained, and thus ratification could occur only by recourse to section 205.

3. Section 204(c): Stockholder Adoption

Section 204 does not require that every ratifying resolution be submitted to stockholders for their adoption. Instead, stockholder approval of the ratification is required only in situations where the defective corporate act (i) would have required stockholder approval under either the certificate of incorporation, the bylaws, the DGCL, or any plan or arrangement to which the corporation was a party, either at the time of the defective corporate act or at the time the ratifying resolution is adopted, and (ii) did not result from a failure to comply with section 203 of the DGCL.[72] The stockholder voting requirements under the DGCL are stable; they include significant corporate actions, such as mergers[73] or conversions,[74] amendments to the certificate of incorporation,[75] sales, leases or exchanges of all or substantially all of the corporation's assets,[76] and dissolutions.[77] Changes in stockholder voting requirements, if any, will arise from amendments to the corporation's organizational documents. As indicated above, and as is the case with the board's adoption of the ratifying resolution, section 204(c) recognizes that there will be a gap in time between the date of the defective corporate act and the date on which it is submitted to stockholders for their approval, and it seeks to give effect to the approvals that would have been necessary at the time of the defective corporate act.[78] As with the corollary in section 204(b), this mea-

72. Del. Code Ann. tit. 8, § 204(c) (West, Westlaw through 79 Laws 2013, chs. 1–185).
73. *See id.* §§ 251, 252, 254, 257, 258, 263 & 264.
74. *See id.* § 266.
75. *See id.* § 242.
76. *See id.* § 271.
77. *See id.* § 275.
78. *See id.* § 204(c). As with the board's ratifying resolution, any vote of the stockholders necessary under section 204 may be taken by written consent of stockholders in lieu of a meeting pursuant to section 228 (unless the certificate of incorporation restricts action by written consent). Where the ratifying resolution is adopted by written consent of stockholders, prompt notice of the action must be furnished to all holders who, if the action had been taken at a meeting, would have been entitled to notice of the meeting if the record date for notice of the meeting had been the date

sure was intended to serve as a safeguard against circumventing rights that stockholders may have negotiated and to give effect to the reasonable expectations of investors at the time they made their investment decision. The specific approvals required are set forth in section 204(d).

4. Section 204(d): Notice, Quorum, and Voting

Section 204(d) contains detailed provisions for providing notice to, and seeking a vote of, stockholders in cases where section 204(c) requires the ratifying resolution to be submitted to stockholders for their adoption.

(a) Notice to Current Holders

Under section 204(d), where a ratifying resolution is required to be submitted to stockholders, the corporation must provide notice to all current record holders of the corporation's "valid stock" and "putative stock," whether such shares are voting or nonvoting shares, at the address of such holder as it appears or most recently appeared, as appropriate, on the records of the corporation.[79] That notice must be provided at least twenty days before the date of the meeting, and it must include the time, place (if any), and purpose of the meeting.[80] The notice must also contain a copy of the ratifying resolution and a statement that any claim that the defective corporate act or putative stock to be ratified is void or voidable due to the identified failure of authorization, or that the Court of Chancery should declare in its discretion that a ratification in accordance with section 204 not be effective or be effective only on certain conditions, must be brought within 120 days of the validation effective time.[81]

Determining which persons must receive the notice requires an understanding of what constitutes "valid stock" and "putative stock." Section 204(h) defines "putative stock" to mean

> the shares of any class or series of capital stock of the corporation (including shares issued upon exercise of options, rights, warrants or other securities convertible into shares of capital stock of the corporation, or interests with respect thereto that were created or issued pursuant to a defective corporate act) that: (a) [b]ut for any failure of authorization, would constitute valid stock; or (b) [c]annot be determined by the board of directors to be valid stock.[82]

The definition must be considered in light of what constitutes "valid stock," which is defined to mean "shares of any class or series of capital stock of the corporation that have been duly authorized and validly issued in accordance with

that written consents signed by a sufficient number of holders of valid stock necessary to adopt the board's ratifying resolution were delivered to the corporation. *See id.* § 228(e). In such circumstance, if the notice required by section 204(g) was not previously given, then such notice shall be given in connection with the notice given pursuant to section 228(e). *See id.* § 204(g).

79. *Id.* § 204(d).
80. *Id.*
81. *Id.*
82. *Id.* § 204(h)(4).

[the DGCL]."[83] Section 204(h) provides that the determination of which shares are valid and which, if any, are putative is to be made by the board of directors,[84] and that "[i]n the absence of actual fraud in the transaction, the judgment of the board of directors that shares of stock are valid stock or putative stock shall be conclusive, unless otherwise determined by the Court of Chancery in a proceeding brought pursuant to Section 205."[85] The phrase "in the absence of actual fraud," as used in section 204(h), is derived from section 152 of the DGCL and likely would be construed in a similar manner.[86]

(b) Notice to Holders at the Time of the Defective Corporate Act

The corporation must also provide the same notice that is provided to current holders to holders of record of valid stock and putative stock, whether voting or nonvoting, as of the time of the defective corporate act.[87] Such notice, however, need not be provided to holders at that earlier time whose identities or addresses cannot be determined from the corporation's records.[88]

83. *Id.* § 204(h)(6).

84. *See id.* § 204(h). Unless the board decides to the contrary, all outstanding shares would be treated as valid. All outstanding stock should be presumptively valid. Other than the initial authorizing resolutions, the board should not be required to make a specific determination of validity for outstanding shares to be treated as valid stock under these provisions.

85. *Id.*

86. *See id.* § 152. The Delaware courts have adopted a construction of "actual fraud" for purposes of DGCL § 152 that requires a lesser showing than is required to demonstrate common law fraud. *See, e.g.*, Parfi Holding AB v. Mirror Image Internet, Inc., 794 A.2d 1211, 1233–35 (Del. Ch. 2001) ("Section 152 deals with a situation in which the directors of a corporation have accepted non-cash consideration in exchange for company stock, and there is a dispute raised about whether the non-cash consideration was worth what the directors said it was. To put it more concretely, if a board issued 100 shares of stock to its majority stockholder in exchange for 100,000 bananas that the board valued at $100,000, § 152 would govern any challenge to the directors' valuation of the bananas. . . . Our courts have been relatively flexible in implementing § 152's 'actual fraud' requirement, and for good reason. The term seems to have little to do with common law fraud, the elements of which involve: (1) a false representation of material fact; (2) made with knowledge that the representation is false; (3) an intention to induce the person to whom it is made to act or refrain from acting in reliance upon it; (4) causing that person, in justifiable reliance upon the statement, to take or refrain from taking action; and (5) damages. The concept of actual fraud under § 152 has to be read in the context in which it is used. When corporate directors allow the corporation to accept bananas they know to be worth $10,000 on the open market from a majority stockholder in exchange for $100,000 worth of corporate stock, they have *in colloquial terms* committed a 'fraud on the corporation' they are entrusted to manage. Even though the transaction itself may not have involved any material false statement or detrimental reliance, the corporation has in layman's terms been snookered because the directors consummated a transaction on terms they knew to be unfair to the corporation. Put another way, they knew that the non-cash consideration they were causing the corporation to accept was not worth the cash value they impliedly or explicitly placed upon it. As a result, our courts have said that § 152 does not bar a challenge to the directors' judgment on the value of non-cash consideration when an 'excessive valuation . . . is so gross as to lead the Court to conclude that it was due, not to an honest error of judgment but to bad faith or a reckless indifference to the rights of others.' Furthermore, when § 152 applies, there is authority that suggests that the statutory 'actual fraud' provision does not provide a defense when the underlying transaction involves unfair self-dealing proscribed by equitable fiduciary duty concepts." (footnotes omitted)), *rev'd on other grounds*, 817 A.2d 149 (Del. 2002); *see also* London v. Tyrrell, C.A. No. 3321-CC, 2008 WL 2505435, at *7 n.37 (Del. Ch. June 24, 2008).

87. DEL. CODE ANN. tit. 8, § 204(d) (West, Westlaw through 79 Laws 2013, chs. 1–185).

88. *Id.*

(c) Quorum and Voting

Section 204(d) provides that the quorum and vote required at the time the ratifying resolution is submitted to the stockholders are necessary to adopt the resolution, unless the DGCL, the certificate of incorporation or bylaws, or plan or agreement in effect at the time of the defective corporate act would have required a greater quorum or vote.[89] As with section 204(b)'s quorum and vote requirements applicable to board action, the stockholder quorum and vote provisions make exceptions for shares of any class or series that are no longer outstanding.[90] In the case of an election of directors, ratification would require the affirmative vote of the majority of shares present at the meeting and entitled to vote on the election of the director (or such greater vote that would have been required under the certificate of incorporation or bylaws at the time of the election). Thus, a "plurality" of the votes, even if expressly provided in the certificate of incorporation or bylaws as the voting requirement for the election of directors, would not be sufficient to ratify an election. In addition, to ensure that the ratification procedure in section 204 is not used to circumvent the stockholder approval requirements in section 203 of the DGCL,[91] section 204(d) requires any defective corporate act resulting from a failure to comply with section 203 to be submitted to stockholders for ratification, regardless of whether a stockholder vote would have been required at the time of the defective corporate act.[92]

While the issues that may arise in seeking any vote on a defective corporate act are too numerous to catalogue, the hypothetical below illustrates certain classes of issues that the authors have seen in practice. Assume, for example, that in 2012, the board sought to amend its certificate of incorporation to increase the number of shares of capital stock, including the shares of common stock and preferred stock, authorized for issuance. At the time, the corporation's bylaws provided that two-thirds of the outstanding shares of capital stock entitled to vote on the amendment would constitute a quorum for any meeting of stockholders and that, on all matters presented to the stockholders, other than the election of directors, the affirmative vote of two-thirds of the outstanding

89. *Id.*

90. *Id.*

91. *See id.* § 203(a). Section 203 restricts certain "business combinations" with "interested stockholders." An "interested stockholder" is generally defined as the owner of 15 percent or more of the corporation's outstanding voting stock. *See id.* § 203(c)(5). The term "business combination" is defined broadly to cover mergers and consolidations of the corporation (or direct or indirect subsidiary) with the "interested stockholder"; sales, leases, exchanges, mortgages, pledges, transfers, or other dispositions (except proportionately as a stockholder) to the interested stockholder, of assets of the corporation (or direct or indirect subsidiaries) having an aggregate market value equal to 10 percent of either the aggregate market value of the corporation's assets (on a consolidated basis) or the aggregate market value of the corporation's outstanding stock; transactions that result in the issuance or transfer by the corporation (or by any subsidiary) of stock of the corporation to the interested stockholder, with limited exceptions; transactions involving the corporation or its subsidiaries that have the effect, directly or indirectly, of increasing the proportionate share of the stock of any class or series (or other securities) of the corporation or subsidiary that are owned by the interested stockholder, with limited exceptions. *See id.* § 203(c)(3).

92. *See id.* § 204(d)(3).

stock entitled to vote at any meeting at which a quorum is present shall be necessary to approve the matter. Assume that the corporation has two series of preferred stock, Series A Preferred Stock and Series B Preferred Stock, outstanding. The certificate of incorporation does not contain a so-called "242(b)(2) carve-out,"[93] and it requires, for so long as at least 50 percent of the shares of Series B Preferred Stock issued on the original issue date are outstanding, the approval of holders of a majority of the outstanding Series B Preferred Stock, voting as a single class, to approve any amendment. In 2014, the board determines that the amendment increasing the authorized stock was not valid, because the stockholder consent was delivered before the time at which the board formally adopted the amendment.[94] Since the time at which the 2012 amendment was filed with the Delaware Secretary of State, however, the board has amended the bylaws to set the quorum and vote required for stockholder action at a simple majority, and the corporation has repurchased 75 percent of the shares of Series B Preferred Stock that were outstanding on the original issue date. Under section 204, two-thirds of the outstanding shares of capital stock will be necessary to constitute a quorum for the stockholders' meeting at which the ratifying resolution is considered, and the vote of two-thirds of the outstanding capital stock entitled to vote is necessary to authorize the amendment, since those were the quorum and voting requirements at the time the amendment was originally purportedly adopted. In addition, under section 242(b)(2), the vote of a majority of the outstanding common stock and a majority of the outstanding preferred stock, each voting as a separate class, will be required to approve the amendment.[95] In addition, assuming some shares of Series B Preferred Stock are outstanding, the separate vote of a majority of the outstanding Series B Preferred Stock will be required to approve the amendment. If, however, all of the shares of Series B Preferred Stock have been repurchased or redeemed by the time of such meeting, the vote of the Series B Preferred Stock would not be required.

5. Section 204(e): Certificate of Validation

Section 204(e) provides that, if the defective corporate act being ratified would have required a filing with the Delaware Secretary of State, in lieu of filing or re-

93. Under section 242 of the DGCL, the holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase or decrease the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely. *See id.* § 242(b)(2). Section 242(b)(2) provides an exception for the first type of amendment, however, stating that the number of authorized shares of any such class or classes of stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote irrespective of section 242(b)(2), if so provided in the original certificate of incorporation, in any amendment thereto creating the class or that was adopted prior to the issuance of shares of the class, or in any amendment thereto that was authorized by a resolution adopted by the affirmative vote of a majority of the class. *Id.*

94. *See, e.g.*, Tansey v. Trade Show News Networks, Inc., C.A. No. 18796, 2001 WL 1526306, at *4 (Del. Ch. Nov. 27, 2001).

95. DEL. CODE ANN. tit. 8, § 242(b)(2) (West, Westlaw through 79 Laws 2013, chs. 1–185).

filing such otherwise required certificate, the corporation must file a "certificate of validation" to effect the ratification.[96] Such certificate must be filed regardless of whether a certificate was previously filed with respect to the act in question. The certificate of validation must set forth (1) a copy of the ratifying resolution, (2) the date of its adoption by the board of directors and, if applicable, the stockholders, and a statement that it was duly adopted in accordance with section 204, (3) the information that would have been specified in the filing that would otherwise be required, and (4) if a certificate was previously filed with respect to the defective corporate act being ratified, the title and the date of the filing of such previously filed certificate and any certificate of correction thereto.[97]

6. Section 204(f): Relation Back

(a) General

Section 204(f) gives effect to the common law doctrine that the ratification of a prior act relates back to the time the original act was defectively taken.[98] Specifically, section 204(f) states that, from and after the validation effective time,[99] unless otherwise determined by the Court of Chancery in an action pursuant to new section 205, (i) each defective corporate act will no longer be void or voidable as a result of the failure of authorization and "such effect shall be retroactive to the time of the defective corporate act" and (ii) each share (or fraction of a share) of putative stock issued or purportedly issued pursuant to the defective corporate act shall no longer be void or voidable as a result of the failure of authorization and, "in the absence of any failure of authorization not ratified, shall be deemed to be an identical share or fraction of a share of outstanding stock as of the time it was purportedly issued."[100]

96. *Id.* § 204(e).

97. *Id.* Several provisions of the DGCL require filings with the Delaware Secretary of State. Chief among these, in the ratification context, are sections 151 (certificate of designations; eliminations), 241 (amendments to the certificate of incorporation before receipt of payment for capital stock), 242 (amendments to the certificate of incorporation after receipt of payment for the capital stock), 243 (retirement of stock), 245 (restatements of the certificate of incorporation), 251, 252, 253, 254, 257, 258, 263, 264, and 267 (mergers), 265 and 266 (conversion), and 275 (dissolution). It is anticipated in most cases that changes to a defective original certificate of incorporation would need to be made by a certificate of correction under section 103(f) of the DGCL, and not by a certificate of validation. *See id.* § 103(f).

98. *See, e.g.*, Michelson v. Duncan, 407 A.2d 211, 219 (Del. 1979) ("It is the law of Delaware, and general corporate law, that a validly accomplished shareholder ratification relates back to cure otherwise unauthorized acts of officers and directors."); Schreiber v. Bryan, 396 A.2d 512 (Del. Ch. 1978); *Hannigan*, 47 A.2d at 173, for the proposition that "'[t]he effect of a subsequent ratification is that it relates back and gives validity to the unauthorized act or contract, as of the date when it was made and affirms it in all respects as though it had been originally authorized. The act is legalized from its inception.'" (citation omitted).

99. *See supra* note 65 and accompanying text (defining "validation effective time").

100. DEL. CODE ANN. tit. 8, § 204(f) (West, Westlaw through 79 Laws 2013, chs. 1–185). The reference in section 204(f) to the Court of Chancery's power in a proceeding under section 205 was not intended to delay or suspend the effectiveness of a ratification following the validation effective time or the ability to provide a legal opinion as to the effectiveness of the ratification prior to the expiration of the 120-day period in section 205(f), but rather was intended to clarify that the language of section 204(f) was not intended to preempt the power of the Court of Chancery under section 205.

For purposes of the DGCL, acts that were taken at a specified date, including shares that were purportedly issued at a certain date, or options, warrants, or other rights to acquire stock that were granted at a certain date, may be validated as of that date if properly ratified in accordance with new section 204. It is important to note, however, that section 204(f) only removes the taint of voidness or voidability that stems from the "failure of authorization."[101] That is, the statute only addresses technical defects giving rise to a claim that an act is void or voidable. An act that is properly ratified under section 204 may be given retroactive legal effect from a technical standpoint, but it would not be insulated from an equitable challenge.[102] Although not specifically addressing principles of ratification, the Delaware Court of Chancery recently noted that all corporate acts, even if in compliance with the DGCL, may be invalidated on equitable grounds.[103] In *Bloodhound Technologies*, the court addressed alleged statutory defects in connection with a charter amendment. Ruling on a motion to dismiss, the court noted that, even assuming the particular amendment at issue was validly adopted, that would not end the court's analysis.[104] "Corporate acts," the court stated, "are 'twice-tested,' once for statutory compliance and again in equity."[105]

(b) Implications of Retroactive Effect

One of the key features of the statute is that the ratification of a defective corporate act will relate back to the time of the original act, thereby curing it retroactively. This feature is intended to address the house-of-cards problem caused where a defective act occurs and subsequent acts are taken in reliance on the defective prior act having been effective. By validating the defective act with retroactive effect, there is no need to validate each subsequent act that might itself have been defective as a result of the original defective act. Thus, validating stock would validate any election called into question as a result of the defective stock being voted at the election. Validating an election or appointment of a director would validate each action taken by the board that otherwise might be called into question because of the participation of the invalidly elected director. The ratification statutes are intended to enable corporations to give effect to the state of the corporation as all parties believed it to be—and that otherwise would have been but for a failure of authorization.

7. Section 204(g): Notice

In order to ensure that a ratification would not prejudice the rights of any party in interest, section 204(g) requires that notice of the ratification be pro-

101. *Id.*
102. *Id.*
103. Carsanaro v. Bloodhound Techs., Inc., 65 A.3d 618 (Del. Ch. 2013); *see also* John Mark Zeberkiewicz & Stephanie Norman, *The Equitable Case for Ratification*, DEL. BUS. CT. INSIDER, Mar. 27, 2013, at 1.
104. *Bloodhound Techs.*, 65 A.2d at 641–42.
105. *Id.* at 641.

vided even where no stockholder approval is necessary.[106] This notice would need to be provided to all current stockholders as well as to holders of valid and putative stock as of the time of the defective corporate act to be ratified (unless those holders cannot be identified from the corporation's records). This notice would need to contain substantially the same notice provided to stockholders in the case where a vote of stockholders is required. Current, former and putative stockholders objecting to the ratification may bring a cause of action challenging the ratification under section 205.[107]

8. Section 204(i): Non-exclusive Means of Ratification

Section 204(i) recognizes that not every act suffering from a failure of authorization is incapable of ratification under common law, and it provides that new sections 204 and 205 are not designed to preempt common law ratification where it would otherwise be available. Thus, section 204(i) expressly states that the procedures under sections 204 and 205 are not intended to preempt or restrict other means of ratifying acts that are merely voidable.[108]

Despite cases like *Blades* and *ev3*, the Delaware Court of Chancery has acknowledged the common-law notion of "ratification." In *Klig v. Deloitte LLP*, the Court of Chancery sanctioned the ratification by a partnership's board of a decision by members of management of a limited liability partnership to place a partner on leave of absence.[109] The court in *Klig* cited the following discussion in *Lewis v. Vogelstein*:

> One way of conceptualizing th[e] effect [of ratification] is that it provides, after the fact, the grant of authority that may have been wanting at the time of the agent's act. Another might be to view the ratification as consent or as an estoppel by the principal to deny a lack of authority. In either event the effect of informed ratification is to validate or affirm the act of the agent as the act of the principal.[110]

Although section 204(i) states that it is not necessary to use the ratification statutes to effect a common-law ratification that would have otherwise been available, sections 204 and 205 remain available to corporations that seek to invoke those statutes for the protection they provide. In light of the difficulty of determining whether at common law a particular defect would render an act void or voidable, it will often be prudent to use the ratification statutes unless the defect is one that clearly under common law would have rendered the act voidable rather than void.[111]

106. DEL. CODE ANN. tit. 8, § 204(g) (West, Westlaw through 79 Laws 2013, chs. 1–185).
107. *Id.* § 205.
108. *Id.* § 204(i).
109. 36 A.3d 785 (Del. Ch. 2011).
110. *Id.* at 794 (quoting 699 A.2d 327, 334–35 (Del. Ch. 1997)) (internal citation omitted).
111. *Cf.* Klaassen v. Allegro Dev. Corp., C.A. No. 8626-VCL, 2013 WL 5739680, at *19 n.10 (Del. Ch. Oct. 11, 2013) (stating, in a case involving an officer's challenge to his removal, that Delaware precedent suggests a distinction between a failure to give notice of a board meeting in the specific manner required by the bylaws (in which case the board action would be void) and a contention that the lack of notice was inequitable (in which case the board action is voidable in equity), but not-

B. Section 205: Application to the Court of Chancery

Section 205 confers jurisdiction on the Court of Chancery to hear and determine the validity of any ratification effected pursuant to new section 204 and the validity of any corporate act or transaction and any stock or rights or options to acquire stock, and to modify or waive any of the procedures set forth in new section 204. Section 205 was determined to be necessary in light of cases such as *In re Native American Energy Group, Inc.*, in which the Court of Chancery indicated that the petitioner's request, pursuant to section 225(b) of the DGCL, that the court remedy a flaw in the corporation's capital structure could not be granted, as it would result in an impermissible advisory opinion.[112]

1. Section 205(a): Parties Entitled to Commence Actions; Determinations Authorized to Be Made by the Court of Chancery

Section 205(a) sets forth which parties may bring an action in the Delaware Court of Chancery in respect of defective corporate acts, and what the Court of Chancery may do in response. Those parties include (i) any member of the board of directors, (ii) any current record or beneficial holder of valid stock or putative stock, (iii) any record or beneficial holder of valid or putative stock as of the time of a defective corporate act ratified under section 204, or (iv) any other person claiming to be substantially and adversely affected by a ratification pursuant to section 204.[113] Thus, persons with contractual or employment relationships with the corporation who believe their rights as such have been substantially and adversely affected by a ratification would have standing, at least as an initial mater, to bring an action to challenge a ratification or to validate an act.

Section 205(a) states that, in any proceeding brought under section 205, the Court of Chancery may (i) determine the validity and effectiveness of any defective corporate act ratified under section 204; (ii) determine the validity and effectiveness of the ratification of any defective corporate act under section 204; (iii) determine the validity and effectiveness of any defective corporate act not ratified or not ratified effectively under section 204; (iv) determine the validity of any corporate act or transaction and any stock, rights, or options to acquire stock; and (v) modify or waive any of the procedures set forth in section 204 to ratify a defective corporate act.[114] While (i) and (ii) above seem closely re-

ing, "[a]dmittedly, the case law in this area has not always been consistent"). The court subsequently stated that its prior opinion "reasoned that because [the officer] challenged his removal on equitable grounds, the defendants could raise equitable defenses to defeat his claims," and "held that when the Allegro board of directors (the 'Board') removed Klaassen, that action was at most voidable, not void." Klaassen v. Allegro Dev. Corp., C.A. No. 8626-VCL, 2013 WL 5967028, at *1 (Del. Ch. Nov. 7, 2013). The Delaware Supreme Court affirmed the Court of Chancery's judgment, holding that "the Appellant's claim for relief was equitable in nature and, therefore, was subject to equitable defenses." Klaassen v. Allegro Dev. Corp., C.A. No. 583, 2013, 2013 WL 6798468, at *1 (Del. Dec. 20, 2013) (TABLE). The court noted that "[a]n Opinion setting forth [its] reasoning [would] follow in due course." *Id.*

112. C.A. No. 6358-VCL, 2011 WL 1900142, at *5–6 (Del. Ch. May 19, 2011).

113. Del. Code Ann. tit. 8, § 205(a) (West, Westlaw through 79 Laws 2013, chs. 1–185).

114. *Id.*

lated, the main distinction is that item (i) relates to the validity and effectiveness of the underlying act that was ratified under section 204, while item (ii) is focused on the *process* by which the act was ratified (i.e., whether the ratification complied with section 204). Item (iii) is analytically distinct from the first two items in that it gives parties the opportunity to seek a determination regarding the effectiveness of an act that the corporation has not yet ratified or has not ratified effectively under section 204. Item (iv) specifically addresses actions to determine the validity of any corporate act or transaction, or of any stock, rights, and options. Item (v) gives the Court of Chancery broad powers to vary the procedures in section 204 as the equities may dictate.

2. Section 205(b): Orders and Declarations

Section 205(b) operates to restore, as broadly as possible, the equitable powers of which the Court of Chancery was apparently divested in *STAAR*. In any action under section 205, the Court of Chancery may, among other things, declare a ratification under section 204 to be effective (or effective upon certain terms and conditions), validate defective acts or putative stock and impose conditions on their validation, and provide remedies for those harmed by any ratification (or from any order of the Court of Chancery in respect of a ratification).[115] In terms of remedial measures, the statute expressly provides that the "harm" incurred by any person excludes the harm that would have resulted if the defective corporate act had been valid when approved or effectuated. Thus, for example, a holder of junior preferred stock who is pushed further down in the capital structure as a result of a ratification validating a new series of senior preferred stock is not entitled to a remedy under section 205 for the economic dilution to its preference.[116] The holder may, in that case, have an equitable challenge (e.g., if the board otherwise breached its fiduciary duties in authorizing and issuing the new series of preferred stock).[117]

In addition to the foregoing, section 205(b) provides that the Court of Chancery may order the Delaware Secretary of State to accept instruments for filing and to provide an effective date that is before or after the date of the order, provided that the filing date of the instrument is determined in accordance with section 103(c)(3) of the DGCL.[118] Section 103(c)(3) generally provides that an instrument is recorded as having been filed on the date and at the time it is received for filing.[119] More important, however, is the effective date of the instru-

115. *Id.* § 205(b).

116. *Id.*

117. *See, e.g.*, Carsanaro v. Bloodhound Techs., Inc., 65 A.3d 618, 641 (Del. Ch. 2013).

118. Del. Code Ann. tit. 8, § 205(b).

119. *Id.* § 103(c)(3) ("Upon delivery of the instrument, the [Delaware] Secretary of State shall record the date and time of its delivery. Upon such delivery and tender of the required taxes and fees, the [Delaware] Secretary of State shall certify that the instrument has been filed in the [Delaware] Secretary of State's office by endorsing upon the signed instrument the word 'Filed,' and the date and time of its filing. This endorsement is the 'filing date' of the instrument, and is conclusive of the date and time of its filing in the absence of actual fraud. The [Delaware] Secretary of State shall file and index the endorsed instrument. Except as provided in paragraph (c)(4) of this section

ment, as that is what governs the time at which the action is deemed effective.[120] This provision of section 205(b), therefore, is specifically designed to provide authorization for the Court of Chancery to order the Delaware Secretary of State to accept a filing with an effective date prior to the actual filing date.

Section 205(b) also expressly authorizes the Court of Chancery to approve a stock ledger for the corporation, which may include stock ratified under section 204, as well as to declare shares of putative stock valid, or to require the corporation to deliver valid shares in place of putative shares.[121] The Court of Chancery may also order a meeting of stockholders, declare a defective corporate act that it validates effective as of the time of the defective corporate act or at such other time as the court shall determine, and declare that putative stock it validates shall be deemed valid stock as of the time originally issued or purportedly issued or at such other time as the court shall determine.[122] Finally, the Court of Chancery may make all such other orders as it deems proper under the circumstances.[123] In some respects, the entire subsection could have been drafted to include just that last clause. Nevertheless, the enumerated list was deemed useful as guidance to parties as to the type of orders that may be sought and entered, and it is necessary to clarify that the harm the Court of Chancery is entitled to remedy does not include harm not relating to the validation of the act itself.

3. Section 205(c): Service of Process

Section 205(c) sets forth the manner in which service of process in a proceeding under section 205 is made.[124] As with similar types of proceedings, the statute provides that service of the application under section 205(a) upon the corporation's registered agent in the State of Delaware shall be deemed service. No party other than the corporation need be joined in the action for the Court of Chancery to have jurisdiction over the matter. Where the corporation itself is filing the petition, however, the Court of Chancery may require notice to be provided to other parties and may permit other parties to intervene.[125]

4. Section 205(d): Considerations

Section 205(d) provides a non-exclusive list of factors that the Court of Chancery may consider when making any judgments or determinations under subsections (a) or (b) of section 205. These include whether the parties authorizing the defective act originally believed that it was being authorized in accor-

and in subsection (i) of this section, such filing date of an instrument shall be the date and time of delivery of the instrument.").

120. Under section 103(d) of the DGCL, an instrument is generally effective upon its "filing date," unless it expressly provides for a future effective time within ninety days of the filing date. *See id.* § 103(d).

121. *Id.* § 205(b).

122. *Id.*

123. *Id.*

124. *Id.* § 205(c).

125. *Id.*

dance with the DGCL, certificate of incorporation, or bylaws; whether the board treated the act as valid subsequent to its authorization; whether any party relied on a public representation that the act was valid; whether any person would be harmed by the act (other than harm that would have resulted if the defective act had been valid when approved or effected); and whether any person will be harmed by the failure to ratify or validate the act.[126] The Court of Chancery is also entitled to consider such other factors or matters that it deems just and equitable.

5. Section 205(e): Jurisdiction

Section 205(e) provides that the Court of Chancery is vested with exclusive jurisdiction to hear and determine all actions brought under this section.[127] As with other provisions of the DGCL vesting exclusive jurisdiction in the Court of Chancery to hear and determine actions,[128] section 205(e) ensures that the Delaware Superior Court will not have concurrent jurisdiction to hear and determine actions brought under section 205;[129] it does not, however, necessarily preclude courts in other jurisdictions that otherwise have jurisdiction over the necessary parties from deciding actions under section 205.[130]

6. Section 205(f): Statute of Limitations

Section 205(f) provides a time limit during which actions may be brought under section 205. As a general matter, no action asserting that a defective corporate act or putative stock ratified under section 204 is void or voidable due to a failure of authorization, or that the Court of Chancery should declare any such ratification ineffective or effective only on certain conditions, may be brought after the expiration of 120 days from the validation effective time.[131] Importantly, the limitations period does not apply to ratifications that were not validly

126. *Id.* § 205(d).

127. *Id.* § 205(e).

128. *See, e.g.*, *id.* §§ 145(k), 220(c).

129. *See* Johnston v. Caremark Rx, Inc., C.A. No. 17607, 2000 WL 354381, at *3 (Del. Ch. Mar. 28, 2000) ("Delaware clearly does not have *exclusive* jurisdiction over [actions for advancement of expenses or indemnification under section 145]. [The Court of Chancery] does, however, exclusive of any other *Delaware* court, have jurisdiction over these disputes when it is appropriate to hear them in Delaware."); *see also* Encompass Servs. Holding Corp. v. Prosero Inc., C.A. No. 578-N, 2005 WL 332810, at *5 (Del. Ch. Feb. 3, 2005) (rejecting the argument that the language of section 262 precluded the presentation of an appraisal claim to any other court or tribunal and noting that "even if § 262 was intended to grant exclusive jurisdiction to [the Court of Chancery] within the Delaware judicial system, it is doubtful that it could prevent a federal court acting under the bankruptcy law from exercising jurisdiction over an appraisal claim"); Albert v. Alex. Brown Mgmt. Servs., Inc., C.A. No. 04C-05-250 PLA, 2004 WL 2050527, at *5 (Del. Super. Ct. Sept. 15, 2004) ("The real question is whether the word 'may' grants [the Delaware] Chancery Court exclusive jurisdiction over § 17-111 [of the Delaware Revised Uniform Limited Partnership Act] actions, or merely concurrent jurisdiction with the Superior Court.").

130. A court of competent jurisdiction outside of Delaware presumably could hear and determine an action under section 205 and could fashion an appropriate remedy thereunder, as was essentially done, prior to the enactment of section 205, by the Circuit Court of the Fifteenth Judicial District, Palm Beach County, Florida, in the Vitacost matter. *See supra* note 47.

131. DEL. CODE ANN. tit. 8, § 205(f) (West, Westlaw through 79 Laws 2013, chs. 1–185).

accomplished in accordance with section 204.[132] The limitations period is also ineffective against any person who was required to receive notice under the statute but did not receive such notice.[133]

III. Illustration of Operation

While the ratification statutes, including the "relation back" concept, are fairly simple to conceptualize when a single act is viewed in isolation, it is important to bear in mind that corporate acts exist along a continuum, and that providing a cure for one act may affect other acts. Among the important questions in this context is what, if any, "domino effect" results from the ratification of an antecedent act. The following hypothetical is intended to illustrate the operation of the ratification statutes, including the manner in which failures of authorization are identified and the underlying defective corporate acts are submitted for approval.

Scenario One: 2010 Issuance of Series B Preferred Stock

In 2010, the board of directors of ABC Corp. (the "Company") issued 100,000 shares of Series B Preferred Stock, which is senior in liquidation to all other outstanding stock (the "2010 Issuance"). At the time of the issuance, the Company had two classes of authorized capital stock, common stock (the "Common Stock") and preferred stock (the "Preferred Stock"). The Common Stock was held principally by founders and employees and represented approximately 75 percent of the outstanding voting power. The Company was authorized to issue 150,000 shares of Preferred Stock. Through its "blank check" Preferred Stock provision, the Company had designated 100,000 shares of Series A Preferred Stock, all of which were held by a single venture capital fund. The Certificate of Designation of the Series A Preferred Stock required a vote of a majority of the outstanding shares of that series to authorize the creation and issuance of any new shares of parity or senior stock.

In connection with the 2010 Issuance, the Company's general counsel prepared two documents: a certificate of amendment increasing the authorized shares of Preferred Stock (the "2010 Amendment") and a Certificate of Designation of the Series B Preferred Stock (the "Series B Designation"). The general counsel determined that because the terms of the Common Stock were not being affected by the 2010 Amendment, no vote of the Common Stock was required to authorize it. The general counsel did, however, seek the consent of the Series A Preferred Stock. He circulated a form of written consent providing, in relevant part, as follows:

> WHEREAS, in connection with the proposed issuance of 100,000 shares of Series B Preferred Stock of the Company, the Company desires to amend its Certificate of Incorporation to authorize additional shares of its Preferred Stock.

132. *Id.*
133. *Id.*

> RESOLVED, that the undersigned hereby consent to the amendment of Article IV of the Certificate of Incorporation of the Corporation such that it shall read in its entirety as follows:
>
> > The Company shall be authorized to issue 1,000,000 shares of capital stock, which shall be divided into two classes, consisting of 800,000 shares of common stock, par value $.01 per share, and 200,000 shares of preferred stock, par value $.01 per share.

The form of consent also provided for the approval of certain amendments to the Certificate of Designation of the Series A Preferred Stock (the "Series A Amendments"), including eliminating the separate series vote necessary to authorize the creation and issuance of senior equity securities, which were stated to be attached as an exhibit to the consent. The form of consent circulated to the holder, however, omitted that exhibit. Nevertheless, the majority holder of the Series A Preferred Stock, which had a designee on the Company's board and was generally aware of the terms of the transaction, executed the consent. With that stockholder consent in hand, the general counsel then prepared a form of written consent of the board of directors to authorize the Amendment, the Series A Amendments, and the Series B Designation. The form of consent submitted to the board included a resolution to amend Article IV of the certificate of incorporation identical to the one included in the consent submitted to the holder of Series A Preferred Stock. It also contained a resolution approving the terms of the Series B Preferred Stock "in substantially the form attached as Exhibit A" to the consent. That attached form had several blanks, including with respect to the "original purchase price" of the Series B Preferred Stock (which term was used for purposes of the conversion price, the liquidation amount, and the calculation of dividends) as well as the rate at which dividends would be paid on the Series B Preferred Stock. Finally, the form of board consent included a resolution authorizing the issuance of "up to 100,000 shares of Series B Preferred Stock pursuant to the terms of the Series B Preferred Stock Purchase Agreement in substantially the form attached as Exhibit B" to the consent. As with the form of Series B Certificate of Designation, the form of purchase agreement had several blanks, including with respect to the price per share.

Mistakenly believing that directors may not vote on matters as to which they have a "conflict of interest," the general counsel neither sought nor secured the consent of the director nominated and elected by the separate vote of the Series A Preferred Stock, since the fund that nominated him intended to participate in the Series B financing. All of the other directors executed the consent. During the course of the ensuing week, the Company's chief executive officer and the general counsel concluded the negotiations over the Series B purchase agreement. The Series B Preferred Stock round closed on June 1, 2010. The Certificate of Amendment to implement the Amendment and the Series B Certificate of Designation were then filed with the Delaware Secretary of State.

Ratification of the 2010 Issuance

The creation and issuance of the Series B Preferred Stock involved several "failures of authorization," which if not ratified could result in the Series B Preferred Stock being void. Ratifying that putative stock, however, is not as simple as the board's adoption of a resolution stating that the stock was not issued in compliance with the certificate of incorporation or the DGCL. The existence of the Series B Preferred Stock is predicated on its having first been authorized from the "blank check" Preferred Stock—and, in this case, the actions to authorize the increase in the authorized number of shares of Preferred Stock were technically deficient, as explained below. Correcting that prior defect is a necessary, but not sufficient, step toward validating the Series B Preferred Stock. In any ratification under section 204, after a defect that requires ratification has been identified, the first step is to identify the "failures of authorization." In the case of the 2010 Issuance, the defects are as follows:

First, the 2010 Amendment was not duly authorized. To be effective, an amendment to the certificate of incorporation generally must be approved by the board, adopted by the requisite vote of stockholders, and included in a filing with the Delaware Secretary of State—and the authorizing events must occur in that sequence.

Failure in Authorization—Board Approval. The board's vote to approve the 2010 Amendment was flawed. The board purported to act by written consent, but the consent was not signed by all directors as required by section 141(f) of the DGCL.[134]

Failures in Authorization—Stockholder Adoption. Even if the board's approval had been properly obtained, the stockholders' adoption of the 2010 Amendment would still be deficient. As a general matter, an amendment to the certificate of incorporation must be adopted by a majority in voting power of the stock entitled to vote and by a majority of each class entitled to vote thereon as a separate class.[135] Additional voting requirements (e.g., a larger proportion of stockholders or a vote by separate series) may also be imposed by the certificate of incorporation.[136] In the present case, the stockholders' adoption of the 2010 Amendment would have required (1) a majority in voting power of the Common Stock and the Series A Preferred Stock, voting as a single class, (2) a majority of the Common Stock, voting as a separate class, and (3) a majority of the Series A Preferred Stock, voting as a separate class.[137] The Common Stock did not participate in the stockholder consent, and the Series A Preferred Stock, on its own, did not have sufficient votes to adopt the 2010 Amendment. In any case, the consent by which the Series A Preferred Stock approved the amendment did not include the exhibit showing the proposed amendments.[138] Thus, the 2010 Amendment was not authorized under section 242(b)(1). Additionally, because the certificate of amendment increased the authorized

134. *See* Solstice Capital II, Ltd. P'ship v. Ritz, C.A. No. 278-N, 2004 WL 765939, at *1 (Del. Ch. Apr. 6, 2004).
135. Del. Code Ann. tit. 8, § 242 (West, Westlaw through 79 Laws 2013, chs. 1–185).
136. *Id.* § 102(b)(4).
137. *Id.* § 242(b).
138. *See* Carsanaro v. Bloodhound Techs., Inc., 65 A.3d 618, 641 (Del. Ch. 2013).

number of shares of Common Stock and Preferred Stock, a vote of the Common Stock and Series A Preferred Stock (as the only outstanding series of that class), each voting as a separate class, was required for its authorization. As indicated above, no vote of the Common Stock was sought or obtained. Thus, the 2010 Amendment was not authorized by the Common Stock, as a separate class, under section 242(b)(2).

Failure in Authorization—Sequence of Events. Even if the proper votes had been obtained, the 2010 Amendment was not adopted in accordance with the sequence of events prescribed by section 242 of the DGCL.[139]

Failure in Authorization—Failure to Provide Notice of Action to Non-consenting Holders. Section 228(e) of the DGCL requires that "[p]rompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders or members who have not consented in writing and who, if the action had been taken at a meeting, would have been entitled to notice of the meeting."[140] It does not appear that non-consenting holders of Common Stock or Preferred Stock were given notice of the adoption of the 2010 Amendment in accordance with section 228(e). It is possible that the corporation could cure this defect by providing notice under section 228(e) now, although that outcome is uncertain given the length of the delay.[141]

Second, even if the 2010 Amendment had been validly adopted, the Series B Preferred Stock would still be invalid, since its creation and issuance was flawed.

Failure in Authorization—Creation. The board's resolutions establishing the Series B Preferred Stock were deficient in that the board failed to fix the number of shares constituting the series and failed to establish the material terms of the series. That is, the board's failure to fix the original purchase price led to the liquidation preference, the conversion ratio, and the dividend rate being undetermined. Those terms were effectively fixed by officers, and not by the board, as the DGCL would require.[142]

Failure in Authorization—Issuance. The board failed to authorize a specific number of shares and failed to fix the purchase price for the shares (or the formula for determining the purchase price). Although those items were set by management, sections 152 and 153 of the DGCL would require those matters to be fixed by the board.[143]

139. *See* Blades v. Wisehart, C.A. No. 5317-VCS, 2010 WL 4638603, at *11 n.91 (Del. Ch. Nov. 17, 2010); Tansey v. Trade Show News Networks, Inc., C.A. No. 18796, 2001 WL 1526306, at *4 (Del. Ch. Nov. 27, 2001).

140. DEL. CODE ANN. tit. 8, § 228(e) (West, Westlaw through 79 Laws 2013, chs. 1–185).

141. *See* DiLoreto v. Tiber Holding Corp., C.A. No. 16564, 1999 WL 1261450, at *5 (Del. Ch. June 29, 1999) ("Although a certificate amended by written consent takes effect upon proper filing even before prompt notice is given, failure to give notice promptly may in certain instances, such as this one, preclude enforcement of the amended provisions—at least until it is filed and notice is actually given.").

142. *See* Grimes v. Alteon, Inc., 804 A.2d 256, 260–61 (Del. 2002); Olson v. ev3, Inc., C.A. No. 5583-VCL, 2011 WL 704409, at *11 (Del. Ch. Feb. 21, 2011).

143. *See* Field v. Carlisle Corp., 68 A.2d 817, 818 (Del. Ch. 1949).

To validate the Series B Preferred Stock, the Corporation must first ratify the 2010 Amendment. That will require the board to adopt a resolution approving the 2010 Amendment and identifying the categories of failures of authorization relating thereto. The ratifying resolution must then be submitted to stockholders. It will require the quorum and vote required at the time of the defective corporate act and at the time of the ratifying resolution. The stockholders entitled to vote on the amendment will be the holders of Common Stock and Series A Preferred Stock, and they must approve it by a majority in voting power of the Common Stock and Series A Preferred Stock, voting as a single class, and by a majority of the outstanding Common Stock and Series A Preferred Stock, each voting as a separate class. Notice of the time, date and place, if any, and purpose of the meeting at which the ratification resolution will be submitted must be given at least twenty days in advance of the meeting to each holder of record of valid stock and putative stock. Notice must also be given to the holders of record of valid stock and putative stock as of the time the defective corporate act. In this case, the "defective corporate act" was the 2010 Amendment. Therefore, notice must be provided to all holders on the date on which the defectively authorized 2010 Amendment was filed with the Secretary of State and purported to become effective. The notice will need to identify the defects in the acts and the stock that was purportedly issued pursuant to the acts to be ratified. Although they would receive notice, holders of Series B Preferred Stock, as holders of putative stock, would not be entitled to vote on the ratifying resolution. Because the action being ratified is an amendment to the certificate of incorporation, the Company must file a certificate of validation. Since notice will have already been given in connection with the stockholder vote to ratify the 2010 Amendment, no additional notice is necessary.

Next, the Company must take steps to validate the Series B Preferred Stock. In this case, the failures of authorization related principally to the board's failure to fix the terms of the Series B Preferred Stock and to properly authorize the issuance of the shares of Series B Preferred Stock. Thus, the board must adopt a ratifying resolution that identifies the defects in the creation and issuance of the Series B Preferred Stock. That ratifying resolution need not be submitted to the stockholders, since the board would have had the power, without further stockholder action, to create and issue the Series B Preferred Stock from its "blank check" authority. The ratifying resolution, however, must be set forth on a certificate of validation, since the creation and issuance of the Series B Preferred Stock required a filing with the Delaware Secretary of State (i.e., the Series B Certificate of Designation). Since no vote of stockholders was necessary to adopt the Series B Certificate of Designation, notice will need to be given to all holders of valid stock and putative stock, both at the time of the ratification and at the time the Series B Preferred Stock was originally purportedly issued. This notice may be combined with the notice sent regarding the 2010 Amendment.

Once these steps are taken, the 2010 Amendment and the Series B Certificate of Designation are valid, and the Series B Stock is valid as of the date of original issue.

Scenario 2: 2011 Issuance of Series C Preferred Stock

For purposes of Scenario 2, assume that the ratification described above had not occurred, and that the Company proceeded toward a new round of financing (the Series C Preferred Stock round). As a condition to the new round, the investors, led principally by the majority holder of the Series B Preferred Stock, demanded a so-called "pay-to-play." The transaction was structured such that each share of Series A Preferred Stock and Series B Preferred Stock held by a holder participating in the new round will be exchanged for a "shadow security" (i.e., a new share of Series A-1 Preferred Stock or Series B-1 Preferred Stock, each with substantially similar rights to the Series A Preferred Stock and Series B Preferred Stock, respectively). The shares of Series A Preferred Stock and Series B Preferred Stock held by non-participants were automatically converted into Common Stock. To implement the pay-to-play provisions, the general counsel prepared an amendment to the Certificate of Incorporation increasing the authorized number of shares of Common Stock and Preferred Stock (the "2011 Amendment"). He prepared a separate amendment to the Certificates of Designation of the Series A Preferred Stock and the Series B Preferred Stock (the "Designation Amendments"). The general counsel followed the same basic authorization procedure as he had with the 2010 Issuance. He sought the stockholder vote—this time securing the vote only of the majority holder of the Series B Preferred Stock, which he believed accounted for a majority of the outstanding Preferred Stock—before approaching the board with the form of consent. The general counsel then sent the form of board consent to the two founder directors and the sole independent director, but he determined not to send it to the director elected by the Series A Preferred Stock or the director elected by the Series B Preferred Stock, since their respective funds, he determined, had an "interest" in the transaction and therefore were disabled from voting.

As he was preparing to file the Certificate of Amendment for the 2011 Amendment, the Designation Amendments, and the Certificate of Designation of the Series C Preferred Stock, the general counsel realized that he had made a mistake when he originally drafted the 2011 Amendment. The 2011 Amendment, as submitted to the board and to the stockholders, stated that it was amending Article IV "in its entirety." It was his intention to amend only the first paragraph of Article IV; he had never intended to eliminate the ensuing paragraphs of Article IV setting forth the Company's "blank check" provisions. Accordingly, in preparing the Certificate of Amendment, the general counsel re-inserted the blank check provisions. After filing the 2011 Amendments, the Designation Amendments, and the Series A-1, Series B-1, and Series C Preferred Stock Certificate of Designation, the board authorized and issued 50,000 shares of Series A-1 Preferred Stock, 50,000 shares of Series B-1 Preferred Stock, and 100,000 shares of Series C Preferred Stock.

Ratification of the 2010 Issuance and 2011 Issuance

At this point, the Company believes: (1) all of the shares of Series A Preferred Stock and Series B Preferred Stock have been converted into Common Stock

pursuant to the automatic conversion feature implemented by the Designation Amendments, (2) the holders who participated in the Series C Preferred Stock round received their pro rata portions of Series A-1 Preferred Stock and Series B-1 Preferred Stock, respectively, and (3) the Series C Preferred Stock was validly issued.

In consultation with Delaware counsel, however, the Company determines that the Series B Preferred Stock was never validly authorized or issued. The Company also determines that the conversion of the Series A Preferred Stock was never validly accomplished, since the Designation Amendments were not validly adopted. (The conversion of the Series B Preferred Stock was never validly accomplished for the additional reason that the Series B Preferred Stock was never validly issued in the first instance.) The Company then determines that there are serious issues with the Series A-1 Preferred Stock, Series B-1 Preferred Stock, and Series C Preferred Stock. That is, if the 2011 Amendment was invalid, at the time those shares were created, the Company had 50,000 shares of Preferred Stock available for creation and issuance under its Certificate of Incorporation (prior to the invalid 2010 Amendment and 2011 Amendment). But the Series A-1 Preferred Stock, Series B-1 Preferred Stock, and Series C Preferred Stock, representing a total of 200,000 shares, were all included in the same Certificate of Designation, and they were all issued at the same time. Due to this fact, the board determines that all such shares constitute an "overissue" and are all therefore "putative stock."

To ratify the foregoing, the board must adopt a ratifying resolution cataloguing the defects in the issuance of the Series B Preferred Stock (as identified above) as well as the defects in the issuance of the Common Stock issued upon conversion of the Series A Preferred Stock and the Series B Preferred Stock. The resolution must also identify the defects in the issuance of the Series A-1 Preferred Stock, Series B-1 Preferred Stock, and Series C Preferred Stock.

For the Series B Preferred Stock to be validated, the 2010 Amendment must be ratified, as well as the creation and issuance of the Series B Preferred Stock. For the Series A-1 Preferred Stock, Series B-1 Preferred Stock, and Series C Preferred Stock to be ratified, the 2011 Amendment must first be ratified. The ratification of the 2011 Amendment will have the effect of curing the conversion of the Series A Preferred Stock and Series B Preferred Stock into Common Stock. (Incidentally, the ratification resolution for the 2011 Amendment will have the effect of curing the inadvertent omission of the blank check provisions from Article IV, which defect may have been correctible under pre-existing law (DGCL section 103(f)) through a certificate of correction.)

The ratification resolutions for the 2010 Amendment and the 2011 Amendment would be approved by the board as a package. In those resolutions, the board would identify the class, series, and number of shares of putative stock, and the failures of authorization that resulted in those shares being putative stock. With notice to all holders of valid stock and putative stock, the resolutions would be submitted to the holders of the Common Stock and the holders of the Series A Preferred Stock for their approval (by the vote of a majority in voting

power of the outstanding capital stock and by a majority of the Common Stock and Series A Preferred Stock, each voting as a separate class). The resolutions would be submitted only to the holders of those shares, since they constitute the only shares of valid stock. Note that the shares of Common Stock purportedly resulting from the conversion of the Series A Preferred Stock and the Series B Preferred Stock would not be included in that vote. If approved, the board would file a certificate of validation for each of the 2010 Amendment, the Series B Certificate of Designation, the 2011 Amendment, and the Series A-1, Series B-1, and Series C Preferred Stock Certificates of Designation. The filing of those certificates of validation would have the effect of validating the issuance of all series of Preferred Stock, as well as the shares of Common Stock issued upon the conversion reflected in the 2011 Amendment. Notices of all of the foregoing and the ratification of the various stock issuances would need to be given in accordance with section 204. Once completed, each of these acts would be ratified and effective as of the dates originally taken, and all the stock would be ratified and valid as of the date originally issued. In addition, all subsequent actions taken in reliance upon the effectiveness of the 2010 Amendment, the Series B Certificate of Designation, the 2011 Amendment, and the Series A-1, Series B-1, and Series C Preferred Stock Certificate of Designation, and the shares issued pursuant thereto, would be validated.

IV. Conclusion

The ratification statutes represent an important development in Delaware corporate law. The ratification statutes, when effective, will eliminate the uncertainty faced by counsel and courts confronted with defects in stock issuances and other corporate acts by providing a practical and certain path to curing those defects that will result in the corporation and its stockholders being restored to the positions they thought they occupied and having the interests they thought they had before the defects were discovered. In most cases, this will be the preferred remedy. If it is not, the Court of Chancery will now have jurisdiction, as with all corporate acts, to use its equitable powers to validate or invalidate, as applicable, defective corporate acts and putative stock.