

CLIENT ADVISORY:

MODIFICATIONS ENACTED IN DELAWARE GENERAL CORPORATION LAW

More than 1,000,000 U.S. and international business entities are incorporated in the State of Delaware. The state's corporations division reports that over 50 percent of all publicly-traded companies in the U.S., including 64 percent of the Fortune 500, have chosen Delaware as their legal home. If you are considering Delaware as the best fit for incorporating a business, it is important to stay informed about changes to its corporation laws.

In August of 2015, the Delaware legislature modified Section 204 of the Delaware General Corporation Law ("Act") in several areas relating to corporate and board governance, which are outlined in this summary. Changes include a new provision that offers a straightforward means for ratifying the election of the initial board retroactively as well as subtle alterations pertaining to how defective attempts at corporate action can be ratified by both boards and shareholders.

For corporations at early stages of governance having elected an initial board, or for any corporation seeking to remedy a defective corporate action through the proper approval and ratification protocols, these modifications to the Act will prove highly relevant.



Delaware General Corporation Law Section 204 Modifications

- **Board Ratification of Election of Initial Board.** Section 204(b)(2) was added to the Act to ratify the election of such persons who, despite having not been named in the certificate of incorporation or by the incorporator as the initial directors, first took action on behalf of the corporation as the board of directors. The resolutions ratifying such action must state: (i) the name(s) of the person(s) who first took action in the name of the corporation as the initial board of directors, (ii) the earlier of the date on which such person(s) first took action or were purported to have been elected to the initial board and (iii) that the ratification of the election of such person(s) as the initial board is approved.
- **Election of Directors by Stockholder Approval.** Section 204(d)(2) states that if the certificate of incorporation or bylaws in effect at the time of the vote on the ratification of the election of directors, or at the time of the defective election, require or required a larger portion of stock, or of any class or series of stock, or of a specified stockholder, in order to elect such director, then the affirmative vote of such larger number or portion of stock or of any class or series of stock or of such specified stockholder will be required to ratify the election.
- **Ratification of Defective Corporate Acts.** Included with the amended sections of the Act was Section 204, which sets forth procedures for ratifying corporate acts that would otherwise be void or voidable due to a "failure of authorization," i.e., the failure (i) to authorize or effect an act or transaction in compliance with the Act, the corporation's certificate of incorporation or bylaws, or any plan or agreement to which the corporation is a party to the extent such failure would render such act or transaction void or voidable; or (ii) of the board or any officer of the corporation to authorize or approve any act or transaction of the corporation that would have required for its due authorization the approval of the board or such officer.

- Board Ratification of Multiple Defective Acts. The amendments to Section 204(b)(1) confirm that a single set of resolutions may be used by the board of directors to ratify multiple defective corporate acts. However, the quorum and voting requirements are determined on an act-by-act basis. In other words, if one act required two-thirds board approval and another act only required majority board approval, the ratifying resolutions will require two-thirds board approval for the former act and majority board approval for the latter act.
- Stockholder Ratification of Multiple Defective Acts. Section 204(c) provides that a defective corporate act must be submitted to stockholders for their approval if such act would have required a vote of stockholders under the Act relating to the certificate of incorporation or bylaws of the corporation, or any plan to which the corporation is a party, either at the time of the defective corporate act or the time the board adopts the resolutions ratifying the act. As with director ratification of multiple defective acts, stockholder approval of each defective act must meet the applicable quorum and voting requirements on an act-by-act basis.
- Stockholders Entitled to Vote. Pursuant to the amended Section 204(d), the only stockholders entitled to vote on the ratification of a defective corporate act, or to be counted for purposes of a quorum for such vote, are the holders of record of valid stock as of the record date for determining stockholders entitled to vote thereon. In other words, the “retroactive” validity given to putative stock (i.e., the shares that, but for any failure of authorization, would constitute valid stock or cannot be determined by the board to be valid stock) will not result in such putative stock being considered valid stock as of the record date for the vote on the ratification of a defective corporate act or acts submitted to stockholders.



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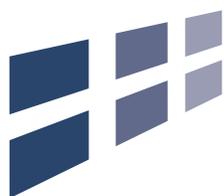
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