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SB-218 Corporations: ratification or validation of noncompliant corporate actions. (2021-2022)

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Date Published: 08/30/2022 04:00 AM

Senate Bill No. 218

CHAPTER 217

An act to amend Section 110 of, and to add Section 119 to, the Corporations Code, relating to corporations.

[Approved by Governor August 29, 2022. Filed with Secretary of State August 29, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

SB 218, Jones. Corporations: ratification or validation of noncompliant corporate actions.

The General Corporation Law provides for the formation of domestic general corporations by the execution and filing of articles of incorporation with the Secretary of State. Under that law, the business and affairs of these corporations are generally managed by, and all corporate powers are exercised by or under, the direction of their boards of directors, and each director is elected by shareholder vote, with certain exceptions, as specified.

Existing law requires the Secretary of State, upon receipt of any instrument for filing, to file and provide the date of endorsed filing, if that instrument conforms to law. Existing law permits an instrument that does not conform to law to be resubmitted in accordance with specified procedures. Existing law also permits an agreement, certificate, or other instrument relating to a domestic or foreign corporation filed under the General Corporation Law to be corrected with respect to any misstatement of fact contained therein, as provided.

This bill, except as provided, would authorize otherwise lawful corporate actions, as defined, not in compliance, or purportedly not in compliance, with the General Corporation Law or the articles, bylaws, or a plan or agreement to which the corporation is a party in effect at the time of a corporate action, to be ratified, or validated by the superior court, in conformity with certain procedures. The bill would require, among other things, that the ratification of a corporate action pursuant to the bill's provisions be approved by the board and, as applicable, approved by the shareholders or approved by the outstanding shares in accordance with the General Corporation Law and the articles, bylaws, and any plan or agreement to which the corporation is a party in effect at the time of ratification, except as specified. The bill would require a corporation, if a corporate action ratified or validated would have required the filing of an instrument with the Secretary of State or if the ratification or validation would cause any instrument previously filed with the Secretary of State to be inaccurate or incomplete in any material respect, to file a certificate of ratification or certificate of validation to make, amend, or correct those instruments. The bill would also make conforming changes.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 110 of the Corporations Code is amended to read:

110. (a) Upon receipt of any instrument by the Secretary of State for filing pursuant to this division, if it conforms to law, it shall be filed by, and in the office of, the Secretary of State and the date of filing endorsed thereon. Except for instruments filed pursuant to Section 1502, the date of filing shall be the date the instrument is received by the Secretary of State unless the instrument provides that it is to be withheld from filing until a future date, other than instruments filed pursuant to Section 119, or, unless in the judgment of the Secretary of State, the filing is intended to be coordinated with the filing of some other corporate document which cannot be filed. The Secretary of State shall file a document as of any requested future date not more than 90 days after its receipt, including a Saturday, Sunday, or legal holiday, if the document is received in the Secretary of State's office at least one business day prior to the requested date of filing. An instrument does not fail to conform to law because it is not accompanied by the full filing fee if the unpaid portion of the fee does not exceed the limits established by the policy of the Secretary of State for extending credit in these cases.

(b) If the Secretary of State determines that an instrument submitted for filing or otherwise submitted does not conform to law and returns it to the person submitting it, the instrument may be resubmitted accompanied by a written opinion of the member of the State Bar of California submitting the instrument, or representing the person submitting it, to the effect that the specific provision of the instrument objected to by the Secretary of State does conform to law and stating the points and authorities upon which the opinion is based. The Secretary of State shall rely, with respect to any disputed point of law (other than the application of Sections 119, 201, 2101, and 2106), upon that written opinion in determining whether the instrument conforms to law. The date of filing in that case shall be the date the instrument is received on resubmission.

(c) Any instrument filed with respect to a corporation, other than original articles or instruments filed pursuant to Section 119, may provide that it is to become effective not more than 90 days subsequent to its filing date. In case such a delayed effective date is specified, the instrument may be prevented from becoming effective by a certificate stating that by appropriate corporate action it has been revoked and is null and void, executed in the same manner as the original instrument and filed before the specified effective date. In the case of a merger agreement, the certificate revoking the earlier filing need only be executed on behalf of one of the constituent corporations. If no revocation certificate is filed, the instrument becomes effective on the date specified.

(d) Any instrument submitted to the Secretary of State for filing by a domestic corporation or a foreign corporation that is qualified to transact business in California under Section 2105 shall include the entity name and number as they exist on the Secretary of State's records.

SEC. 2. Section 119 is added to the Corporations Code, to read:

119. (a) (1) Otherwise lawful corporate actions not in compliance, or purportedly not in compliance, with this division or the articles, bylaws, or a plan or agreement to which the corporation is a party in effect at the time of the corporate action, may be ratified, or validated by the superior court, in accordance with the provisions of this section.

(2) Except as otherwise determined by the superior court pursuant to subdivision (e), a ratification or validation of a corporate action in accordance with this section is conclusive in the absence of fraud.

(3) This section does not limit the authority of the board, the shareholders, or the corporation to effect any other lawful means of ratification or validation of a corporate action or correction of a record.

(4) No corporate action may be ratified under subdivision (b) by a dissolved corporation or a foreign corporation, and no petition may be filed under subdivision (e) in respect of any corporate action or security of such a corporation.

(5) This section shall not be used to ratify or validate any corporate action in respect of any of the following:

(A) Noncompliance with subdivision (a) of Section 309.

(B) Noncompliance with subdivision (a) or (b) of Section 310.

(C) Noncompliance with Section 315.

(D) Noncompliance with subdivision (a) of Section 500.

(E) Noncompliance with Section 501.

(b) (1) (A) A ratification of a corporate action pursuant to this section, other than a ratification relating to the election of the initial directors pursuant to paragraph (2) of this subdivision, shall be approved by the board and, as applicable, approved by the shareholders or approved by the outstanding shares in accordance with any provision set forth in this division or the articles, bylaws, or a plan or agreement to which the corporation is a party that is applicable to the type of corporate action proposed to be ratified and in effect at the time of the ratification, unless there are no shares outstanding and entitled to vote on the ratification at the time of the ratification, in which case the ratification shall be approved solely by the board, or a higher approval standard that was or would have been applicable to the original taking or purported taking of the corporate action, in which case the ratification

shall be approved in accordance with such higher approval standard. In order to approve a ratification of a corporate action pursuant to this paragraph, the board and, as applicable, the shareholders or the outstanding shares shall adopt resolutions setting forth all of the following:

(i) Each corporate action to be ratified.

(ii) The date when each such corporate action was purportedly taken, and the date any such corporate action shall be deemed to have become effective pursuant to this section if different than the date the corporate action was purportedly taken.

(iii) For a corporate action involving the purported issuance of shares, the number and type of shares purportedly issued and the date or dates upon which such shares were purported to have been issued.

(iv) The nature of the noncompliance or purported noncompliance of each such corporate action.

(v) A statement that the ratification of each such corporate action is approved.

(B) The votes of any shares issued, or purportedly issued, pursuant to any corporate action being ratified shall be disregarded for all purposes of approval of the ratification as required by this subdivision, including, but not limited to, for the purpose of determining a quorum at a meeting of shareholders or required class vote.

(2) If the corporate action to be ratified relates to the election of the initial directors pursuant to Section 210, a majority of the persons who, at the time of the ratification, are exercising the powers of directors may approve that ratification by adopting resolutions setting forth all of the following:

(A) The name of the person or persons who first took action in the name of the corporation as the initial directors of the corporation.

(B) The earlier of the date on which such persons first took such action or were purported to have been elected as the initial directors, and the date on which such person or persons shall be deemed to have become the initial directors of the corporation pursuant to this section if different than the date of such first action or purported election, as applicable.

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

(c) Notice of any ratification of a corporate action pursuant to this section shall be given promptly after ratification pursuant to subdivision (b) to each shareholder and holder of shares purportedly issued at the time of the ratification, regardless of whether approval of the shareholders or of the outstanding shares is required for the ratification. The notice shall be given as provided in subdivision (b) of Section 601 and shall include a copy of any resolutions adopted pursuant to subdivision (b) and a copy of this section. If a corporation that is subject to the reporting requirements of Section 13 or 15(d) of the federal Securities Exchange Act of 1934 includes the disclosures required by this section in a report, proxy statement, or information statement filed with or furnished to the Securities and Exchange Commission, notice shall be deemed given when that report or statement is filed with or furnished to the Securities and Exchange Commission.

(d) (1) If a corporate action ratified pursuant to this section would have required the filing of an instrument with the Secretary of State pursuant to the provisions of this division, or if such ratification would cause any instrument previously filed with the Secretary of State to be inaccurate or incomplete in any material respect after giving effect to the ratification, the corporation shall file a certificate of ratification to make, amend, or correct each such instrument. The certificate of ratification shall have the effect as specified therein, and shall be filed with the Secretary of State. A certificate of ratification shall consist of an officers' certificate setting forth all of the following:

(A) The name of the corporation and the Secretary of State's file number of the corporation.

(B) The title of any such instrument whose making, amendment, or correction is being effected by the certificate of ratification.

(C) The date any such instrument was filed with the Secretary of State, or a statement that any such instrument was not previously filed with the Secretary of State and, as applicable, a statement that the ratification approved pursuant to the resolutions set forth in the certificate of ratification would cause any such instrument to be inaccurate or incomplete in any material respect after giving effect to the ratification.

(D) The date any such instrument shall be deemed to have become effective pursuant to this section, which may be prior to or after the filing date.

(E) A statement that the certificate of ratification is making, amending, or correcting any such instrument, as applicable, and a copy of any such instrument containing all of the information required to be included under this division for such

instrument to be so made, amended, or corrected. An instrument attached to a certificate of ratification pursuant to this subparagraph need not be separately executed and acknowledged and need not include any statement required by any other section of this division that such instrument has been approved and adopted in accordance with the provisions of such other section.

(F) A statement that the ratification has been approved pursuant to subdivision (b), a copy of the resolutions adopted pursuant to subdivision (b) in respect of the ratification including, in the case of the ratification of any corporate action involving the purported issuance of shares, the number and type of shares purportedly issued and the date or dates upon which such shares were purported to have been issued and, if applicable, a statement of the total number of outstanding shares of each class entitled to vote with respect to the ratification.

(G) A statement that the number of shares of each class voting in favor of the ratification equaled or exceeded the vote required, specifying the percentage vote required of each class entitled to vote.

(2) The office of the Secretary of State may, in its discretion, refuse to file any certificate of ratification if the instrument would render prior filings with the Secretary of State inaccurate, ambiguous, or unintelligible. Upon refusal of the Secretary of State to file a certificate of ratification pursuant to this subdivision, the corporation shall seek validation pursuant to subdivision (e).

(e) (1) Upon the filing of a petition by an authorized person, the superior court of the proper county shall have jurisdiction in equity to determine the validity of any corporate action (whether or not such corporate action is a ratification or has been the subject of any ratification) or security of the corporation, validate and declare effective any such corporate action or security of the corporation, and declare the date any such corporate action or security of the corporation shall be deemed to have become effective or valid, as applicable, pursuant to this section.

(2) This section does not prescribe or circumscribe the facts and circumstances the superior court may consider or which remedies the superior court may grant in exercising its jurisdiction under this section, except as described in this subdivision. The superior court may make any order concerning the corporate action as justice and equity may require.

(3) Any petition relating to a ratification taken or proposed to be taken pursuant to this section shall be filed not later than 180 days after the notice required by subdivision (c) is given, except this paragraph shall not apply to an action asserting that a ratification was not accomplished in accordance with this section or to any person to whom notice of the ratification was required to have been given pursuant to subdivision (c), but to whom such notice was not given.

(4) For purposes of this subdivision, the proper county shall be the county where the principal office of the corporation is located or, if the principal office is not located in this state, in the county in which the corporation's agent for service of process is located.

(5) Service of the petition under paragraph (1) upon the registered agent of the corporation shall be deemed to be service upon the corporation, and no other party need be joined in order for the superior court to adjudicate the matter. The superior court may require notice of the action to be provided to other persons specified by the court and permit those other persons to intervene in the action.

(6) For purposes of this subdivision, "authorized person" means the corporation, any successor entity to the corporation, any director, any shareholder or holder of shares purportedly issued, any shareholder or holder of shares purportedly issued as of the time of a corporate action ratified pursuant to this section, or any other person, so long as the other person claims to be substantially and adversely affected by the ratification of a corporate action pursuant to this section.

(7) Any petition seeking validation of a corporate action shall identify every pending legal proceeding of which the petitioner is aware and in which (A) the validity of the corporate action is being directly challenged or (B) the validation of the corporate action would result in the dismissal of the proceeding in whole or in part. If the petitioner becomes aware of any additional such legal proceeding, the petitioner shall amend, or, to the extent required by applicable rules, move for leave to amend, the petition within 10 court days to identify each such proceeding. Identification of a proceeding shall include the venue or forum in which the proceeding was filed, any case number or other unique identifier assigned to the proceeding in that venue or forum, the names of the parties to the proceeding, and the date on which the proceeding was filed.

(f) If a corporate action validated by the superior court pursuant to this section would have required the filing of an instrument with the Secretary of State pursuant to the provisions of this division, or if such validation would cause any instrument previously filed with the Secretary of State to be inaccurate or incomplete in any material respect after giving effect to the validation, the corporation shall file a certificate of validation to make, amend, or correct each such instrument. The certificate of validation shall have the effect as specified therein, and shall be filed with the Secretary of State. A certificate of validation shall consist of an officers' certificate setting forth all of the following:

(1) The name of the corporation and the Secretary of State's file number of the corporation.

(2) The title of any such instrument whose making, amendment, or correction is being effected by the certificate of validation.

(3) The date any such instrument was filed with the Secretary of State, or a statement that any such instrument was not previously filed with the Secretary of State and, as applicable, a statement that the validation ordered pursuant to the superior court order set forth in the certificate of validation would cause any such instrument to be inaccurate or incomplete in any material respect after giving effect to the validation.

(4) The date any such instrument shall be deemed to have become effective pursuant to this section, which may be prior to or after the filing date.

(5) A statement that the certificate of validation is making, amending, or correcting any such instrument, as applicable, and a copy of any such instrument containing all of the information required to be included under this division for such instrument to be so made, amended, or corrected. An instrument attached to a certificate of validation pursuant to this paragraph need not be separately executed and acknowledged and need not include any statement required by any other section of this division that such instrument has been approved and adopted in accordance with the provisions of such other section.

(6) A statement that the validation has been ordered pursuant to subdivision (e), and a copy of the superior court order issued pursuant to subdivision (e) in respect of such validation.

(g) Unless otherwise stated in resolutions adopted pursuant to subdivision (b) or determined by the superior court pursuant to subdivision (e), a corporate action or security of the corporation ratified or validated in accordance with this section relates back to the date of the original corporate action.

(h) As used in this section:

(1) "Corporate action" means any of the following:

(A) Any action or purported action of the board.

(B) Any action or purported action of the shareholders.

(C) Any other action or transaction taken, or purportedly taken, by or on behalf of the corporation, including, but not limited to, any issuance, or purported issuance, of securities of the corporation.

(2) "Higher approval standard" means any provision set forth in this division or the articles, bylaws, or a plan or agreement to which the corporation was a party in effect at the time of the original taking or purported taking of a corporate action:

(A) Requiring action of the board or shareholders, at a meeting or by written consent, to be taken by a proportion greater than would have been required pursuant to this division or the articles, bylaws, or a plan or agreement to which the corporation is a party in effect at the time of the ratification of the corporate action pursuant to this section.

(B) Requiring a greater proportion of the directors or shareholders to constitute a quorum for the transaction of business at a meeting than would have been required pursuant to this division or the articles, bylaws, or a plan or agreement to which the corporation is a party in effect at the time of the ratification of the corporate action pursuant to this section.

(C) Requiring, prohibiting, or prescribing conditions on action of the board or shareholders at a meeting or by written consent, which would not have been required, prohibited, or prescribed pursuant to this division or the articles, bylaws, or a plan or agreement to which the corporation is a party in effect at the time of the ratification of the corporate action pursuant to this section.

(D) Requiring separate action of the holders of any class or series of the corporation's shares or of directors elected, appointed, or nominated by the holders of any class or series of the corporation's shares voting as a class or series, which would not have been required pursuant to this division or the articles, bylaws, or a plan or agreement to which the corporation is a party in effect at the time of the ratification of the corporate action pursuant to this section, unless no shares of that class or series are outstanding at the time of the ratification of the corporate action pursuant to this section.

(E) Requiring separate action of the holders of securities of the corporation other than shares, which would not have been required pursuant to this division or the articles, bylaws, or a plan or agreement to which the corporation is a party in effect at the time of the ratification of the corporate action pursuant to this section, unless those securities are not outstanding at the time of the ratification of the corporate action pursuant to this section.

(F) Requiring separate action of any specified person or persons, which would not have been required pursuant to this division or the articles, bylaws, or a plan or agreement to which the corporation is a party in effect at the time of the ratification of the corporate action pursuant to this section.

(3) "Security" means a share, option, or other security of a corporation.

(i) The corporation shall retain all records related to the ratification or validation of a corporate action under this section in accordance with Section 1500.

(j) If the corporation is a party to a pending legal proceeding in which (1) the validity of a corporate action sought to be ratified or validated pursuant to this section is at issue or (2) the ratification or validation of a corporate action pursuant to this section would result in the dismissal in whole or in part of the proceeding, the corporation shall notify the judge, arbitrator, or other person presiding over the proceeding at least 10 court days prior to adopting resolutions pursuant to subdivision (b) or filing a petition pursuant to subdivision (e) with respect to that corporate action. That person shall have power to stay the ratification or validation as justice and equity may require.