

LEGISLATURE OF NEBRASKA  
ONE HUNDRED SIXTH LEGISLATURE  
SECOND SESSION

**LEGISLATIVE BILL 808**

Introduced by La Grone, 49; Kolterman, 24.

Read first time January 08, 2020

Committee: Banking, Commerce and Insurance

- 1 A BILL FOR AN ACT relating to the Nebraska Model Business Corporation
- 2 Act; to amend section 21-201, Revised Statutes Cumulative
- 3 Supplement, 2018; to define terms; to provide for the ratification
- 4 of defective corporate actions; to harmonize provisions; and to
- 5 repeal the original section.
- 6 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 21-201, Revised Statutes Cumulative Supplement,  
2 2018, is amended to read:

3 21-201 (MBCA 1.01) Sections 21-201 to 21-2,232 and sections 2 to 9  
4 of this act shall be known and may be cited as the Nebraska Model  
5 Business Corporation Act.

6 Sec. 2. (MBCA 1.45) In sections 2 to 9 of this act:

7 (1) Corporate action means any action taken by or on behalf of the  
8 corporation, including any action taken by the incorporator, the board of  
9 directors, a committee of the board of directors, an officer or agent of  
10 the corporation, or the shareholders.

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

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

19 (4) Failure of authorization means the failure to authorize,  
20 approve, or otherwise effect a corporate action in compliance with the  
21 provisions of the Nebraska Model Business Corporation Act, the articles  
22 of incorporation or bylaws, a corporate resolution or any plan or  
23 agreement to which the corporation is a party, if and to the extent such  
24 failure would render such corporate action void or voidable.

25 (5) Overissue means the purported issuance of:

26 (i) Shares of a class or series in excess of the number of shares of  
27 a class or series the corporation has the power to issue under section  
28 21-237 at the time of such issuance; or

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

31 (6) Putative shares means the shares of any class or series,

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

7 (7) Valid shares means the shares of any class or series that have  
8 been duly authorized and validly issued in accordance with the act,  
9 including as a result of ratification or validation under sections 2 to 9  
10 of this act.

11 (8) Validation effective time with respect to any defective  
12 corporate action ratified under sections 2 to 9 of this act means the  
13 later of:

14 (i) The time at which the ratification of the defective corporate  
15 action is approved by the shareholders, or if approval of shareholders is  
16 not required, the time at which the notice required by section 6 of this  
17 act becomes effective in accordance with section 21-215; and

18 (ii) The time at which any articles of validation filed in  
19 accordance with section 8 of this act become effective.

20 The validation effective time shall not be affected by the filing or  
21 pendency of a judicial proceeding under section 9 of this act or  
22 otherwise, unless otherwise ordered by the court.

23 Sec. 3. (MBCA 1.46) (a) A defective corporate action shall not be  
24 void or voidable if ratified in accordance with section 4 of this act or  
25 validated in accordance with section 9 of this act.

26 (b) Ratification under section 4 of this act or validation under  
27 section 9 of this act shall not be deemed to be the exclusive means of  
28 ratifying or validating any defective corporate action, and the absence  
29 or failure of ratification in accordance with sections 2 to 9 of this act  
30 shall not, of itself, affect the validity or effectiveness of any  
31 corporate action properly ratified under common law or otherwise, nor

1 shall it create a presumption that any such corporate action is or was a  
2 defective corporate action or void or voidable.

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

6 (1) The effectiveness under sections 2 to 9 of this act and under  
7 sections 21-2,150 to 21-2,160 of an amendment to the articles of  
8 incorporation authorizing, designating, or creating such shares; or

9 (2) The effectiveness of any other corporate action under sections 2  
10 to 9 of this act ratifying the authorization, designation, or creation of  
11 such shares.

12 Sec. 4. (MBCA 1.47) (a) To ratify a defective corporate action  
13 under this section, other than the ratification of an election of the  
14 initial board of directors under subsection (b) of this section, the  
15 board of directors shall take action ratifying the action in accordance  
16 with section 5 of this act, stating:

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

20 (2) The date of the defective corporate action;

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

23 (4) That the board of directors approves the ratification of the  
24 defective corporate action.

25 (b) In the event that a defective corporate action to be ratified  
26 relates to the election of the initial board of directors of the  
27 corporation under subdivision (a)(2) of section 21-223, a majority of the  
28 persons who, at the time of the ratification, are exercising the powers  
29 of directors may take an action stating:

30 (1) The name of the person or persons who first took action in the  
31 name of the corporation as the initial board of directors of the

1 corporation;

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

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

7 (c) If any provision of the Nebraska Model Business Corporation Act,  
8 the articles of incorporation or bylaws, any corporate resolution, or any  
9 plan or agreement to which the corporation is a party in effect at the  
10 time action under subsection (a) of this section is taken requires  
11 shareholder approval or would have required shareholder approval at the  
12 date of the occurrence of the defective corporate action, the  
13 ratification of the defective corporate action approved in the action  
14 taken by the directors under subsection (a) of this section shall be  
15 submitted to the shareholders for approval in accordance with section 5  
16 of this act.

17 (d) Unless otherwise provided in the action taken by the board of  
18 directors under subsection (a) of this section, after the action by the  
19 board of directors has been taken and, if required, approved by the  
20 shareholders, the board of directors may abandon the ratification at any  
21 time before the validation effective time without further action of the  
22 shareholders.

23 Sec. 5. (MBCA 1.48) (a) The quorum and voting requirements  
24 applicable to a ratifying action by the board of directors under  
25 subsection (a) of section 4 of this act shall be the quorum and voting  
26 requirements applicable to the corporate action proposed to be ratified  
27 at the time such ratifying action is taken.

28 (b) If the ratification of the defective corporate action requires  
29 approval by the shareholders under subsection (c) of section 4 of this  
30 act, and if the approval is to be given at a meeting, the corporation  
31 shall notify each holder of valid and putative shares, regardless of

1 whether entitled to vote, as of the record date for notice of the meeting  
2 and as of the date of the occurrence of defective corporate action,  
3 provided that notice shall not be required to be given to holders of  
4 valid or putative shares whose identities or addresses for notice cannot  
5 be determined from the records of the corporation. The notice must state  
6 that the purpose, or one of the purposes, of the meeting, is to consider  
7 ratification of a defective corporate action and must be accompanied by  
8 (i) either a copy of the action taken by the board of directors in  
9 accordance with subsection (c) of section 4 of this act or the  
10 information required by subdivisions (a)(1) through (4) of section 4 of  
11 this act, and (ii) a statement that any claim that the ratification of  
12 such defective corporate action and any putative shares issued as a  
13 result of such defective corporate action should not be effective, or  
14 should be effective only on certain conditions, must be brought within  
15 one hundred twenty days from the applicable validation effective time.

16 (c) Except as provided in subsection (d) of this section with  
17 respect to the voting requirements to ratify the election of a director,  
18 the quorum and voting requirements applicable to the approval by the  
19 shareholders required by subsection (c) of section 4 of this act shall be  
20 the quorum and voting requirements applicable to the corporate action  
21 proposed to be ratified at the time of such shareholder approval.

22 (d) The approval by shareholders to ratify the election of a  
23 director requires that the votes cast within the voting group favoring  
24 such ratification exceed the votes cast opposing such ratification of the  
25 election at a meeting at which a quorum is present.

26 (e) Putative shares on the record date for determining the  
27 shareholders entitled to vote on any matter submitted to shareholders  
28 under subsection (c) of section 4 of this act, and without giving effect  
29 to any ratification of putative shares that becomes effective as a result  
30 of such vote, shall neither be entitled to vote nor counted for quorum  
31 purposes in any vote to approve the ratification of any defective

1 corporate action.

2 (f) If the approval under this section of putative shares would  
3 result in an overissue, in addition to the approval required by section 4  
4 of this act, approval of an amendment to the articles of incorporation  
5 under sections 21-2,150 to 21-2,160 to increase the number of shares of  
6 an authorized class or series or to authorize the creation of a class or  
7 series of shares so there would be no overissue shall also be required.

8 Sec. 6. (MBCA 1.49) (a) Unless shareholder approval is required  
9 under subsection (c) of section 4 of this act, prompt notice of an action  
10 taken under section 4 of this act shall be given to each holder of valid  
11 and putative shares, regardless of whether entitled to vote, as of (i)  
12 the date of such action by the board of directors and (ii) the date of  
13 the defective corporate action ratified, provided that notice shall not  
14 be required to be given to holders of valid and putative shares whose  
15 identities or addresses for notice cannot be determined from the records  
16 of the corporation.

17 (b) The notice must contain (i) either a copy of the action taken by  
18 the board of directors in accordance with subsection (a) or (b) of  
19 section 4 of this act or the information required by subdivisions (a)(1)  
20 through (4) or (b)(1) through (3) of section 4 of this act, as  
21 applicable, and (ii) a statement that any claim that the ratification of  
22 the defective corporate action and any putative shares issued as a result  
23 of such defective corporate action should not be effective, or should be  
24 effective only on certain conditions, must be brought within one hundred  
25 twenty days from the applicable validation effective time.

26 (c) No notice under this section is required with respect to any  
27 action required to be submitted to shareholders for approval under  
28 subsection (c) of section 4 of this act if notice is given in accordance  
29 with subsection (b) of section 5 of this act.

30 (d) A notice required by this section may be given in any manner  
31 permitted by section 21-215 and, for any corporation subject to the

1 reporting requirements of section 13 or 15(d) of the Securities Exchange  
2 Act of 1934, may be given by means of a filing or furnishing of such  
3 notice with the United States Securities and Exchange Commission.

4       Sec. 7. (MBCA 1.50) From and after the validation effective time,  
5 and without regard to the one-hundred-twenty-day period during which a  
6 claim may be brought under section 9 of this act:

7       (a) Each defective corporate action ratified in accordance with  
8 section 4 of this act shall not be void or voidable as a result of the  
9 failure of authorization identified in the action taken under subsection  
10 (a) or (b) of section 4 of this act and shall be deemed a valid corporate  
11 action effective as of the date of the defective corporate action;

12       (b) The issuance of each putative share or fraction of a putative  
13 share purportedly issued pursuant to a defective corporate action  
14 identified in the action taken under section 4 of this act shall not be  
15 void or voidable, and each such putative share or fraction of a putative  
16 share shall be deemed to be an identical share or fraction of a valid  
17 share as of the time it was purportedly issued; and

18       (c) Any corporate action taken subsequent to the defective corporate  
19 action ratified in accordance with sections 2 to 9 of this act in  
20 reliance on such defective corporate action having been validly effected  
21 and any subsequent defective corporate action resulting directly or  
22 indirectly from such original defective corporate action shall be valid  
23 as of the time taken.

24       Sec. 8. (MBCA 1.51) (a) If the defective corporate action ratified  
25 under sections 2 to 9 of this act would have required under any other  
26 section of the Nebraska Model Business Corporation Act a filing in  
27 accordance with the act, then, regardless of whether a filing was  
28 previously made in respect of such defective corporate action and in lieu  
29 of a filing otherwise required by the act, the corporation shall file  
30 articles of validation in accordance with this section, and such articles  
31 of validation shall serve to amend or substitute for any other filing



1 with respect to such defective corporate action required by the act.

2 (b) The articles of validation must set forth:

3 (1) The defective corporate action that is the subject of the  
4 articles of validation, including, in the case of any defective corporate  
5 action involving the issuance of putative shares, the number and type of  
6 putative shares issued and the date or dates upon which such putative  
7 shares were purported to have been issued;

8 (2) The date of the defective corporate action;

9 (3) The nature of the failure of authorization in respect of the  
10 defective corporate action;

11 (4) A statement that the defective corporate action was ratified in  
12 accordance with section 4 of this act, including the date on which the  
13 board of directors ratified such defective corporate action and the date,  
14 if any, on which the shareholders approved the ratification of such  
15 defective corporate action; and

16 (5) The information required by subsection (c) of this section.

17 (c) The articles of validation must also contain the following  
18 information:

19 (1) If a filing was previously made in respect of the defective  
20 corporate action and no changes to such filing are required to give  
21 effect to the ratification of such defective corporate action in  
22 accordance with section 4 of this act, the articles of validation must  
23 set forth (i) the name, title, and filing date of the filing previously  
24 made and any articles of correction to that filing and (ii) a statement  
25 that a copy of the filing previously made, together with any articles of  
26 correction to that filing, is attached as an exhibit to the articles of  
27 validation;

28 (2) If a filing was previously made in respect of the defective  
29 corporate action and such filing requires any change to give effect to  
30 the ratification of such defective corporate action in accordance with  
31 section 4 of this act, the articles of validation must set forth (i) the

1 name, title, and filing date of the filing previously made and any  
2 articles of correction to that filing and (ii) a statement that a filing  
3 containing all of the information required to be included under the  
4 applicable section or sections of the act to give effect to such  
5 defective corporate action is attached as an exhibit to the articles of  
6 validation, and (iii) the date and time that such filing is deemed to  
7 have become effective; or

8 (3) If a filing was not previously made in respect of the defective  
9 corporate action and the defective corporate action ratified under  
10 section 4 of this act would have required a filing under any other  
11 section of the act, the articles of validation must set forth (i) a  
12 statement that a filing containing all of the information required to be  
13 included under the applicable section or sections of the act to give  
14 effect to such defective corporate action is attached as an exhibit to  
15 the articles of validation, and (ii) the date and time that such filing  
16 is deemed to have become effective.

17 Sec. 9. (MBCA 1.52) (a) Upon application by the corporation, any  
18 successor entity to the corporation, a director of the corporation, any  
19 shareholder, beneficial shareholder, or unrestricted voting trust  
20 beneficial owner of the corporation, including any such shareholder,  
21 beneficial shareholder, or unrestricted voting trust beneficial owner as  
22 of the date of the defective corporate action ratified under section 4 of  
23 this act, or any other person claiming to be substantially and adversely  
24 affected by a ratification under section 4 of this act, the court may:

25 (1) Determine the validity and effectiveness of any corporate action  
26 or defective corporate action;

27 (2) Determine the validity and effectiveness of any ratification  
28 under section 4 of this act;

29 (3) Determine the validity of any putative shares; and

30 (4) Modify or waive any of the procedures specified in section 4 or  
31 5 of this act to ratify a defective corporate action.

1       (b) In connection with an action under this section, the court may  
2 make such findings or orders, and take into account any factors or  
3 considerations, regarding such matters as it deems proper under the  
4 circumstances.

5       (c) Service of process of the application under subsection (a) of  
6 this section on the corporation may be made in any manner provided by  
7 statute of this state or by rule of the applicable court for service on  
8 the corporation, and no other party need be joined in order for the court  
9 to adjudicate the matter. In an action filed by the corporation, the  
10 court may require notice of the action be provided to other persons  
11 specified by the court and permit such other persons to intervene in the  
12 action.

13       (d) Notwithstanding any other provision of this section or otherwise  
14 under applicable law, any action asserting that the ratification of any  
15 defective corporate action and any putative shares issued as a result of  
16 such defective corporate action should not be effective, or should be  
17 effective only on certain conditions, shall be brought within one hundred  
18 twenty days of the validation effective time.

19       Sec. 10.   Original section 21-201, Revised Statutes Cumulative  
20 Supplement, 2018, is repealed.