CORPORATION, PARTNERSHIPAND LIMITED LIABILITY COMPANY STRUCTURING AND OPT-IN DECISIONS - BUSINESS ORGANIZATIONS CODE

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CHAPTER 3.1

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CORPORATIONS, PARTNERSHIP AND LIABILITY COMPANY STRUCTURING AND OPT-IN DECISIONS -BUSINESS ORGANIZATIONS CODE

I. INTRODUCTION TO CODE

A. Adoption of Code in 2003. The Texas Business Organizations Code (the "TBOC" or the "Code") was a substantive codification of the prior Texas statutes governing non-profit and for-profit, private-sector entities. Those statutes consisted of the Texas Business Corporation Act ("TBCA"), Texas Miscellaneous Corporation Laws Act ("TMCLA"), Texas Limited Liability Company Act ("TLLCA"), Texas Revised Limited Partnership Act ("TRLPA"), Texas Revised Partnership Act ("TRPA"), Texas Non-Profit Corporation Act ("TNPCA"), Texas Real Estate Investment Trust Act ("TREITA"), Texas Uniform Unincorporated Nonprofit Associations Act ("TUUNAA"), Texas Professional Corporation Act ("TPCA"), Texas Professional Associations Act ("TPAA"), Cooperative Associations Act ("CAA") and other pre-existing provisions of Texas statutes governing private entities.

The Code was passed by the Texas Legislature at its Regular Session in 2003 as House Bill 1156. The Code was a joint project of the Business Law Section of the State Bar of Texas and The Office of the Texas Secretary of State. The Texas Legislative Council provided drafting and editing assistance. The Code was under development since 1995, when the Business Law Section first formed a committee to study codification of the foregoing statutes. This committee evolved into a drafting committee (the "Committee") that included representatives of the Secretary of State's Office, solo practitioners, law firm lawyers and prominent law professors from several Texas law schools.

B. 2005 Technical Amendments. The Committee and the Legislative Council have drafted House Bill 1319, a technical amendments bill sponsored in the 2005 Texas Legislature by the Texas Business Law Foundation. H.B. 1319 was passed by the Legislature without amendment. H.B. 1319 amends the Code to reflect changes in the underlying source statutes effected by the 2003 Texas Legislature, to fill gaps in coverage of the Code, to clarify certain provisions and to correct minor errors that have been identified in the Code.

Two other bills were also passed by the 2005 Texas Legislature that amended the TBCA, TLLCA, TRLPA and TRPA in order to make some of the changes needed to eliminate differences between the Code and these source statutes. These bills are H.B. 1154 and H.B. 1507.

C. 2007 Amendments. The Committee also drafted House Bill 1737, which was adopted in the 2007 Texas Legislature and became effective September 1, 2007. The bill made both technical and substantive amendments to the Code. The technical amendments (1) corrected errors in the Code, (2) clarified certain provisions of the Code, (3) filled gaps in coverage of certain provisions of the Code, (4) clarified the transition rules for electing to be governed by the Code's provisions versus the provisions of prior law, (5) eliminated certain redundant or antiquated provisions, and (6) conformed the language of the Code to the language of its source statutes in certain instances where the Code's language unintentionally deviated.

Substantive amendments that were effected by House Bill 1737 included the following: (a) enhanced flexibility for partnerships by creating new rights to cancel events requiring winding up when there are no limited partners, when all or substantially all assets have been sold and upon a request of a partner; (b) enhanced flexibility for nonprofit corporations by eliminating strict requirements for delivery of non-unanimous consents of directors and for setting a new record date for adjournment of a meeting of members; (c) additional logical information requirements for certificates of merger, conversion and exchange; (d) elimination of an outmoded statement required for a certificate of formation of a professional association; (e) addition of express authority for corporate director resignations that are irrevocable or take effect on a later date or specified event; (f) enhanced flexibility for limited liability companies by creating a new right to cancel an event requiring winding up arising from the termination of membership of a company's last remaining member; and (g) revising the charging order provisions for limited partnerships and limited liability companies to conform more to Delaware law.

D. Anticipated 2009 Amendments. The Committee drafted House Bill 2235 (by Giddings), and its companion Senate Bill 1442 (by Fraser), which have been introduced in the 2009 Texas Legislature and, if adopted, will become effective September 1, 2009. As of the date of this paper, May 5, 2009, Senate Bill 1442 (cited as "S.B. 1442") had passed both the Senate and the House, but because of an amendment to the bill on the House floor, it has to go back to the Senate for concurrence. If concurred by the Senate, it is expected that S.B. 1442 will be signed into law by Governor Perry. If S.B. 1442 becomes effective, the bill would make both technical and substantive

amendments to the Code, the TPAA, the TRLPA and the Texas Business & Commerce Code ("TBCC").

The technical amendments in S.B. 1442 would: (1) correct errors in the Code, (2) clarify certain provisions of the Code and the TBCC, (3) fill gaps in coverage of certain provisions of the Code, (4) clarify the transition rules for electing to be governed by the Code's provisions versus the provisions of prior law, (5) eliminate certain redundant or antiquated provisions, and (6) conform the language of the Code to the language of its source statutes in certain instances where the Code's language unintentionally deviated.

A number of revisions that would be effected by this bill to the Code, the TPAA, the TRLPA and the TBCC are needed to take into account changes in the law made by legislation adopted by the Texas Legislature in 2007. These amendments include the following: (a) requiring tax clearance letters or certificates from the Texas Comptroller in order to file certain documents for entities that became taxable entities for franchise tax purposes under Chapter 171 of the Tax Code due to amendments to the Tax Code in 2007; (b) deleting the prohibition against forming railroad companies under the Code; and (c) amending assumed name provisions of the TBCC to provide for filings by foreign filing entities with the Secretary of State and bringing Chapter 71 of the TBCC, which was recodified in 2007, into conformity with the Code.

Substantive amendments that would be effected by this bill include the following: (a) authorizing the formation of limited liability companies that have series of members, managers, membership interests or assets based on provisions in the Delaware statutes; (b) provisions authorizing conversion and continuance transactions based on provisions in the Delaware statutes; (c) eliminating authority for bearer shares or scrip; (d) confirming in the statute that mere ownership of real or personal property in Texas, without more, by a foreign filing entity will not require the entity to register to do business under Chapter 9 of the Code; (e) authorizing emergency provisions in governing documents that are triggered by catastrophic events; (f) authorizing a for-profit corporation to adopt a procedure to deal directly with a beneficial owner of its shares; (g) permitting a beneficial owner of an ownership interest entitled to dissenters' rights to file a petition for appraisal; and (h) authorizing more flexibility regarding voting rights of directors of a for-profit corporation.

The Committee also drafted for the 2009 Regular Session of the Texas Legislature House Bill 3624 and its companion Senate Bill 1773. These bills would clarify the standards for piercing of the liability shield for limited liability companies by adopting the standards set forth in the corporate statutes. This approach is consistent with the result of certain state and federal court cases in Texas that have addressed that issue to date. These bills would have an effective date of September 1, 2009 if adopted by the Legislature. As of the date of this paper, May 5, 2009, Senate Bill 1773 had been passed by the Senate and by the House Business and Industry Committee. It is contemplated that Senate Bill 1773 (cited as "S.B. 1773") will become the primary vehicle for the remainder of the legislative process.

This paper assumes that both S.B. 1442 and S.B. 1773 are passed by the 2009 Texas Legislature and become effective.

II. CODIFICATION PROCESS

Since 1963, the Texas Legislative Council has been authorized and directed by law (Sec. 323.007, Government Code) to revise and reorganize statutes into codes. The codification process involves reclassifying and rearranging the statutes in a more logical order, emphasizing a numbering system and format that will accommodate future expansion of the law, eliminating repealed, invalid, duplicative and other ineffective provisions, and improving the draftsmanship of the law if practicable. These efforts are carried out to make the statutes more accessible, understandable and useable.

This statutory revision process is nearing completion as the Council has proposed and the Legislature has enacted codes covering almost all areas of the Texas statutes. A new code containing the revised and reorganized organizational statutes governing for-profit and non-profit, private-sector entities was one of the last areas to be codified.

The Code contains a number of substantive changes from prior law. In the codification process, the Legislative Council's mandate is not to make any substantive revisions to the Texas statutes. However, several of the code projects in the past (for example, the Election Code, the Tax Code, the Penal Code, the Family Code, the Education Code and the Transportation Code) have contained substantive revisions and were prepared to a great extent by parties other than the Legislative Council, although the Legislative Council participated in the projects primarily as the draftsmen. The Code was drafted primarily by the Committee, not the Legislative Council, and made substantive revisions in a manner similar to these other codes.

In addition to reorganizing, reclassifying, eliminating outdated provisions and improving draftsmanship, the Code has the additional goals of modernizing, simplifying and standardizing provisions, procedures and filings. These goals are

consistent with the objectives of a standard codification project.

III. GENERAL STRUCTURE OF CODE

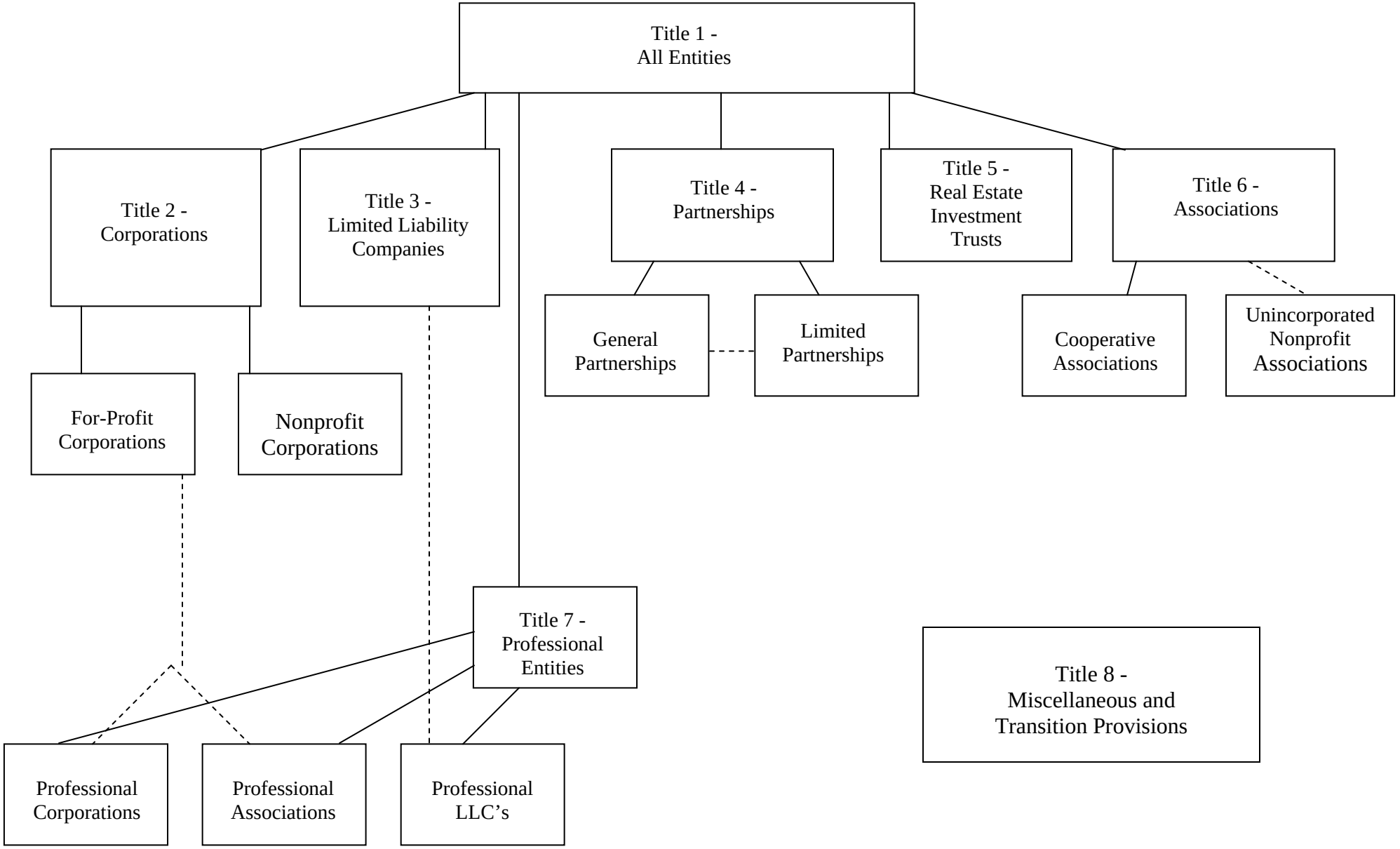
The Committee focused on how an effective recodification of the numerous disparate business statutes in Texas could be achieved. The Committee engaged in extensive discussion concerning the practicability of creating an integrated Code in which common provisions applicable to most forms of business organizations would be placed in a single title with provisions specific to each business form being placed in separate titles. Ultimately, it was decided to divide the Code into "titles," with further divisions within each title into "chapters," "subchapters," and "sections." Title 1 of the Code was developed to contain the common provisions.

The Code's design is derived in part from the three-pronged existing organization of Texas statutes, but takes a simpler approach by drawing the common provisions into one grouping in Title 1 of the Code.

The Code consists of thirty (30) Chapters divided into eight (8) Titles. The Titles of the Code are set forth below:

Title 1	General Provisions
Title 2	Corporations
Title 3	Limited Liability Companies
Title 4	Partnerships
Title 5	Real Estate Investment Trusts
Title 6	Associations
Title 7	Professional Entities
Title 8	Miscellaneous and Transition Provisions

BUSINESS ORGANIZATIONS CODE STRUCTURE



IV. PHASE-IN OF EFFECTIVENESS OF CODE

A. Purpose of Phase-In Period. The Code was adopted with an extensive phase-in period to allow legal practitioners, service providers, government agencies, businesses and citizens to learn about the Code's provisions before they become effective. This deferred effectiveness has also permitted the Texas Legislature to meet in 2005, 2007 and 2009 to make additional changes to the Code.

B. Effective Dates for Domestic Entities. The Code's effective date was January 1, 2006.[1] Any domestic entity formed after that date in Texas must be formed under and governed by the Code.[2] Domestic entities existing before January 1, 2006 will not become subject to the Code until January 1, 2010, with limited exceptions, unless they affirmatively elect to be governed by the Code.[3]

In 2007, House Bill 1737 (cited as "C.S.H.B. 1737") clarified that a domestic entity that is a converted entity resulting from a conversion after the effective date of the Code will be governed by the Code and not any of the source statutes.[4] This change is consistent with the interpretation of the Code by the Texas Secretary of State.

C. Effective Dates for Foreign Entities. The Code also applies after January 1, 2006 to foreign filing entities that have not previously registered with the Texas Secretary of State to transact business in Texas and to all foreign non-filing entities transacting business in Texas.[5] Foreign filing entities registered with the Texas Secretary of State to transact business in Texas before January 1, 2006 will not become subject to the Code until January 1, 2010, with limited exceptions, unless they affirmatively elect to be governed by the Code.[6]

D. Automatic Application of Code to Existing Domestic Entities. If an existing domestic entity does not elect to be governed by the Code, the Code will automatically apply to the entity commencing January 1, 2010.[7] On that same date, the underlying prior statutes (i.e., the TBCA, the TNPCA, the TLLCA, etc.) will also be repealed.[8]

V. EARLY ELECTION TO BE GOVERNED BY CODE

A. Election by Existing Domestic Entities. House Bill 1737 clarified the procedures for adopting the Code by a domestic entity that was in existence on January 1, 2006.[9] The prior language in Section 402.003 of the Code was not clear as to what governing documents of each type of domestic entity specify the procedures for adoption of the Code. To adopt the Code as its governing statute, the bill clarified that the entity must follow the procedures for approval, under prior law and its governing documents, of an amendment to: (i) its articles of incorporation with respect to a corporation or cooperative association, (ii) its regulations with respect to a limited liability company, (iii) its articles of association with respect to a professional association, (iv) its declaration of trust with respect to a real estate investment trust, or (v) its partnership agreement with respect to a partnership. If it is any other type of domestic entity, the procedures for amending its primary governing document would apply.[10] Language was also expanded to clarify that if any of the governing documents, including the certificate of formation, are not in compliance with the Code, the domestic entity must comply with the procedures for amending the noncomplying governing documents, including filing a certificate of amendment to cause its certificate of formation to comply with the Code.[11] Prior confusing language was deleted because it had been misconstrued to allow an election to be governed by the Code without the vote or consent of the owners or members of domestic entities. The revised language relies on the prior law and the entity's governing documents to specify whether the vote or consent of the owners or members of the domestic entity would be needed or not needed in order to adopt the Code or amend its governing documents.

B. Election by Foreign Filing Entities. In order for a foreign filing entity registered with the Texas Secretary of State to transact business in Texas before January 1, 2006 to be governed by the Code, the foreign filing entity must file with the Secretary of State a statement that the foreign filing entity is electing to adopt the Code and an amendment to its

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1 Texas Business Organizations Code §1.002(20). The Texas Business Organizations Code will be cited in subsequent footnotes as "TBOC."

2 TBOC §10.

3 TBOC §402.005(a).

4 C.S.H.B. 1737, 80th Legislature, Sec. 138; TBOC §402.001(a).

5 TBOC §402.001(2) and (3).

6 TBOC §402.005(a).

7 TBOC §402.005.

8 See, e.g., TBCA art. 11.02.B.

9 C.S.H.B. 1737, Sec. 139; TBOC §402.003.

10 Id. §402.003(1).

11 Id. §402.003(2).

application for registration that would cause its application for registration to comply with the Code.[12]

C. Election by Existing Corporation Created Under a Special Texas Statute. Various Texas statutes outside of the TBCA or the TNPCA authorize the creation of corporations. Various provisions of the TBCA, TNPCA and TMCLA specify that the TBCA, TNPCA and TMCLA provide supplemental "gap filling" law with respect to these corporations formed under other Texas statutes. The Code has a similar scheme found in Chapter 23.

As amended by H.B. 1319, in 2005, the Code has a provision that expressly permits these special-statute corporations to adopt the Code after January 1, 2006 as supplemental law governing their internal affairs. H.B. 1319 added a provision to Section 402.005 of the Code that specifies that, on and after January 1, 2010, to the extent provided in Subchapter A of Chapter 23, the Code applies to a corporation created under a special statute of this state outside the Code before January 1, 2006. After January 1, 2006, such corporation, so long as its certificate of formation or equivalent governing document is filed with the Texas Secretary of State, may elect for the Code to apply to the corporation to the extent provided in Subchapter A of Chapter 23 by filing a statement with the Texas Secretary of State and taking other actions in a manner similar to a domestic filing entity, as described in Section XVI.A above.[13]

D. Some Considerations in Choosing Whether to Elect to be Governed by Code. Lawyers should consider whether their client companies or other entities should elect to be governed by the Code rather than the prior Texas statute under which the entities were originally formed. Attorneys advising companies with respect to this decision need to be mindful of who is their client. Rather than the entity itself, the attorney may view different entity stakeholders, namely the governing persons, officers or owners of the entity, as their client. Different practitioners may have different opinions as to whether the Code favors one stakeholder group over another. Some considerations follow:

(1) The prior Texas statutes will continue to govern the acts, contracts or transactions of the domestic entity or its managerial officials, owners or members that occur before the Code becomes applicable to the entity.[14]

(2) Section 402.007 specifies that Chapter 8 of the Code governing any proposed indemnification by a domestic entity after the Code becomes applicable to the entity will apply regardless of whether the events on which the indemnification is based occurred before or after the Code's application to the entity. The governing documents of the entity will not be construed as limiting the permissive indemnification authorized by Chapter 8 unless the limiting provision is intended to limit or restrict permissive indemnification under applicable law.[15]

(3) Sections 402.008 and 402.009 of the Code specify that the Code will apply to meetings of owners, members or governing persons held, and to any actions by written consent that take effect, on or after the date that the Code becomes applicable to the entity. If a meeting was originally called for a date before the Code commences to apply to the entity, the prior Texas statute applies to the meeting, regardless of any postponement or adjournment.

(4) Chapter 10 of the Code governing mergers, conversions, interest exchanges and sales of assets and any other applicable provisions of this Code apply to a transaction consummated by an entity after the date that the Code begins to apply to the entity. However, if a required approval of the owners and members of the entity has been given before such date or has been given after the date but at a meeting of owners or members initially called for a date before such date, the transaction will be governed by the prior Texas statute and not the Code.[16]

(5) Practitioners should give careful thought toward adopting the Code's provisions if the domestic entity plans to wind up and terminate. The Code has more generous provisions that permit survival and reinstatement of an entity

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12 TBOC §402.004.

13 TBOC §402.005(b).

14 TBOC §402.006.

15 H.B. 1319 clarified this provision to limit its applicability to permissive, as opposed to mandatory, indemnification under Chapter 8 and to clarify the effect of existing provisions in the governing documents. The prior provision of the Code was confusing in its requirement that the indemnification in the governing documents "expressly state" that it limits the indemnification authorized by Chapter 8. H.B. 1319 creates a more subjective intent standard to allow appropriate interpretation of the governing documents, which in many cases might have predated the Code by many years, yet should not be ignored simply because they do not specifically contemplate the Code's provisions in Chapter 8.

16 TBOC §402.010.

after termination for various purposes.[17] Chapter 11 of the Code applies to a voluntary winding up and termination proceeding initiated after the date the Code first begins to apply to the entity. Any voluntary winding up and termination proceeding initiated before such date will continue to be governed by the prior Texas statute and not the Code.[18]

(6) A foreign entity that transacted intrastate business in Texas before January 1, 2006 and that is required by the Code to register to transact business in Texas will not be penalized for failure to register if the application for registration is filed no later than January 30, 2006.[19] This provision provides an opportunity for an entity that has been improperly transacting business in Texas to rectify its impropriety by registering under the Code by January 30, 2006.

(7) As amended by H.B. 1319, Section 402.013 permits a domestic filing entity to reinstate its certificate of formation that has been cancelled, revoked, involuntarily dissolved, suspended or forfeited under the prior law in accordance with either such prior law or the Code if it complies with Section 402.003, which specifies the requirements for a domestic entity to elect to be governed by the Code. Nevertheless, any domestic entity whose rights are suspended under the Tax Code must be reinstated under the Tax Code.[20]

VI. TITLE 1

The key to understanding most of the changes effected by the Code are the provisions of Title 1. Title 1 contains the common provisions that generally apply to most types of entities. The Chapters of "Title 1. General Provisions" are set forth below:

Chapter 1 Definitions and Other Provisions
Chapter 2 Purposes and Powers of Domestic Entity
Chapter 3 Formation and Governance
Chapter 4 Filings
Chapter 5 Names of Entities: Registered Agents and Registered Offices
Chapter 6 Meetings and Voting
Chapter 7 Liability
Chapter 8 Indemnification and Insurance
Chapter 9 Foreign Entities
Chapter 10 Mergers, Exchanges, Conversions and Sales of Assets
Chapter 11 Winding up and Termination of Domestic Entity
Chapter 12 Administrative Powers

VII. NEW VOCABULARY OF THE CODE

The key to understanding most of the Title 1 provisions is Section 1.002 of the Code, which contains the definitions for many of the terms used in the Code. This section introduces new terminology not found in the prior statutes primarily for the purpose of the provisions of Title 1. Because Title 1 applies to most entities, common terms used for all entities had to be formulated.

The following discussion summarizes some of the new definitions introduced by the Code:

1. "Organization" — defined by a long list of different types, regardless of whether for-profit, non-profit, domestic or foreign. The term is essentially intended to refer in the broadest sense to any kind of entity or organization regardless of jurisdiction of formation or purpose.[21]

2. "*Non-code organization*" — an organization other than a domestic entity.[22] The term essentially includes either a foreign entity or an organization formed under a Texas law other than the Code, including for example banks and insurance companies.

3. "*Entity*" — either a domestic entity or a foreign entity.[23]

(A) "*Domestic entity*" — an organization formed under or the internal affairs of which are governed by the Code.[24]

(i) "*Filing entity*" — a domestic corporation, limited partnership, limited liability company, professional association, cooperative or real estate investment trust.[25] These domestic entities require a filing with the Secretary of State or a county clerk's office as a condition to formation. The term

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17 TBOC §§11.201-11.206, 11.356.

18 TBOC §402.011.

19 TBOC §402.012.

20 The amended provision also specifies that a foreign filing entity whose registration to do business has been cancelled, revoked, involuntarily dissolved, suspended or forfeited under the prior law may reinstate its registration in accordance with such prior law or the Code if it complies with Section 402.004, which specifies the requirements for a foreign filing entity to elect to be governed by the Code. H.B. 1319 also expanded the application of the provision relating to a forfeiture under the Tax Code by including foreign filing entities whose registration to do business is forfeited under the Tax Code.

21 TBOC §1.002(62).

22 TBOC §1.002(56).

23 TBOC §1.002(21).

24 TBOC §1.002(18).

25 TBOC §1.002(22).

does not include a limited liability partnership notwithstanding the requirement to register annually with the Secretary of State.

(ii) "*Nonfiling entity*" — a domestic entity other than a filing entity.[26] This type of entity does not require a formal filing as a condition to formation. Included in the term are general partnerships[27] and non-profit associations.[28]

(B) "*Foreign entity*" — an organization formed under and whose internal affairs are governed by the laws of a jurisdiction other than Texas.[29]

(i) "*Foreign filing entity*" — a foreign entity that registers or is required to register as a foreign entity under Chapter 9 of the Code, except for a foreign limited liability partnership.[30]

(ii) "*Foreign nonfiling entity*" — a foreign entity that is not a foreign filing entity.[31]

(C) "*Nonprofit entity*" — an entity that is organized solely for one or more of the non-profit or charitable purposes specified in Section 2.002 of the Code and includes a non-profit corporation and non-profit association.[32]

(D) "*For-profit entity*" — an entity other than a non-profit entity.[33]

(E) "*Professional entity*" — Chapter 1 incorporates this definition from Chapter 301.[34] It means a "*professional association*", "*professional corporation*" or "*professional limited liability company*".[35] These terms are defined in Chapter 301 to mean an association, corporation, or limited liability company, respectively, formed for the purpose of providing a professional service and governed as professional entity under Title 7.[36] The term "professional entity" does not include a general partnership or limited liability partnership providing professional services.

Each entity has either "*owners*"[37] or "*members*"[38] which in turn correspond to "*ownership interests*"[39] or "*membership interests*,"[40] respectively, in the entity. For-profit corporations, real estate investment trusts and partnerships have "*owners*," while non-profit corporations and unincorporated non-profit associations have "*members*." Limited liability companies, cooperative associations and professional associations have both "*members*" and "*owners*," and these terms are used interchangeably for these kinds of entities.

A "*filing entity*" is formed by filing a "*certificate of formation*,"[41] which replaces the existing articles of incorporation, articles of organization, certificate of limited partnership or similar document. The term "*organizer*" is used in Chapter 3 in place of "*incorporator*." The organizers must sign the certificate of formation.[42] The certificate of formation and the other documents or agreements adopted by the entity to govern the formation or internal affairs of the entity constitute the "*governing documents*" of the

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26 TBOC §1.002(57).

27 The reference to "general partnerships", by virtue of the definition of that term, includes domestic limited liability partnerships even though they are required to register annually by filing with the Secretary of State.

28 TBOC §1.002(57).

29 TBOC §1.002(28).

30 TBOC §1.002(29). H.B. 1319 clarified the Code by specifically excluding foreign limited liability partnerships from the definition of the term "foreign filing entity." Previously, the definition of this term was not clear and could have been interpreted to include foreign limited liability partnerships. This interpretation would have led to the anomalous result of treating foreign limited liability partnerships as filing entities while treating domestic limited liability partnerships as non-filing entities. H.B. 1319 rectified the potential inconsistent treatment under the Code of domestic versus foreign limited liability partnerships.

31 TBOC §1.002(31).

32 TBOC §1.002(60).

33 TBOC §1.002(26).

34 TBOC §1.002(73).

35 TBOC §301.003(4).

36 TBOC §301.003(2), (3) and (6). The professional service to be provided by a professional corporation must also be one that by law a corporation governed by Title 2 is prohibited from rendering. TBOC §301.003(3). The professional service of a professional association is limited to that rendered by a doctor of medicine, doctor of osteopathy, doctor of podiatry, dentist, chiropractor, optometrist, therapeutic optometrist, veterinarian, or licensed mental health professional. TBOC §301.003(2). The term "licensed mental health professional" is defined in Chapter 301 to mean a non-physician who is licensed to practice psychology or psychiatric nursing or to provide professional therapy or counseling services. TBOC §301.003(1).

37 TBOC §1.002(63).

38 TBOC §1.002(53).

39 TBOC §1.002(64). The term means an owner's interest in an entity, including the owner's share of profits and losses and the right to receive distributions but not the owner's right to participate in management.

40 TBOC §1.002(54). The term means the member's interest in an entity. For a limited liability company, it includes a member's share in profits and losses and right to receive distributions but not the right to participate in management.

41 TBOC §1.002(6).

42 TBOC §3.004.

domestic entity. Similarly, for a foreign entity, the instruments, documents and agreements that govern its formation or internal affairs constitute its "*governing documents*."[43]

A "*filing instrument*" is a document, instrument or statement that is required or authorized to be filed by or for an entity under the Code with the "*filing officer*."[44]

The person or group of persons who are entitled to manage and direct the affairs of an entity under the Code and the governing documents of the entity is referred to as the "*governing authority*."[45] This term refers to:

> (a) the board of directors of a corporation or other persons authorized to perform the functions of the board of directors of a corporation,
>
> (b) the trust managers of a real estate investment trust,
>
> (c) the general partners of a partnership,
>
> (d) the managers of a limited liability company that is managed by managers,
>
> (e) the members of a limited liability company that is managed by its members, or
>
> (f) the board of directors of a cooperative association.

A "*governing person*" is a person who serves on the governing authority of an entity.[46] A "*managerial official*" is:

> (a) an officer, or
> (b) a governing person.[47]

The term "*officer*" is defined in a somewhat circular fashion to be an individual elected, appointed or designated as an officer of an entity by the governing authority or under the governing documents.[48] H.B. 1737 added a cross-reference to the definition of "*person*" contained in Section 311.005 of the Texas Government Code.[49]

The Code also introduces terms to facilitate electronic filing. The Code defines "*signature*" to mean any symbol executed or adopted by a person with present intention to authenticate a writing and includes a digital signature, electronic signature or a facsimile of such.[50] The terms "*writing*" or "*written*" are expanded to encompass textual information stored in an electronic or other medium that is retrievable in a perceivable form, and includes electronic data, "*electronic transmissions*" and reproductions of writings. These terms do not include sound or video recordings of speech.[51] The definition of the term "*electronic transmission*" was added by H.B. 1319 based on the TBCA definition and means a form of communication (other than the physical transmission of paper) that:

> (a) creates a record that may be retained, retrieved and reviewed by the recipient; and
> (b) may be directly reproduced in paper form by the recipient through an automated process.[52]

The term "*certificated ownership interest*" means an ownership interest represented by a certificate issued in bearer or registered form[53] and is introduced in the Code to make generally applicable to domestic entities, other than partnerships and limited liability companies, the certificated share provisions in Chapter 3. The Code also adds a new phrase "*uncertificated ownership interest*" to mean those ownership interests in domestic entities that are not represented by an instrument and are transferred either by amendment of the governing documents or by registration on books maintained for that purpose.[54] The use of the terms "*certificated*" or "*uncertificated*" in connection with particular types of ownership interests throughout the Code should have similar meanings.

A new definition of "*period of duration*" has been added by H. B. 1737 to clarify the meaning of that phrase when used in the Code. The new phrase means a specified term or period of time, or a period that expires as of a specified time or period, but does not include (x) a period that expires upon the occurrence of a future event or fact, other than the

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43 TBOC §1.002(36).

44 TBOC §1.002(23). The "filing officer" is the Texas Secretary of State for all entities other than domestic real estate investment trusts, for which filings must be made with the county clerk of the county in which the tenant's principal office is located in Texas. TBOC §1.002(24).

45 TBOC §1.002(35). The term "governing authority" does not include an officer who is acting in the capacity of an officer.

46 TBOC §1.002(37).

47 TBOC §1.002(52).

48 TBOC §1.002(61).

49 C.S.H.B. 1737, Sec. 1; TBOC §1.002(69-b).

50 TBOC §1.002(82).

51 TBOC §1.002(89).

52 TBOC §1.002(20-a).

53 TBOC §1.002(7).

54 TBOC §1.002(87).

passage of time or the occurrence of a specified time or date, or (y) a period specified to be perpetual. The phrase "*period of duration*" is used in reference to when a domestic entity is required to wind up its business and affairs.[55] In a corresponding change, only a specific period of duration of a filing entity must be listed in the certificate of formation of a new domestic filing entity, and none of the other reasons for why the entity may be required to wind up need be contained in the certificate of formation.[56] A number of provisions in the Code relating to general partnerships were also amended to change references from "term," "duration" or "definite term" to refer to this new defined term "period of duration."[57]

S.B. 1442 added two new definitions that are used in connection with series limited liability companies.[58] A "non-United States entity" is defined to mean a foreign entity formed under, and the internal affairs of which are governed by, the laws of a "non-United States jurisdiction," which in turn is defined as any foreign country or other foreign jurisdiction other than the United States, the District of Columbia, or any other possession or territory of the United States.

A number of other new terms are used in various chapters of Title 1 or elsewhere in the Code but are not defined in Chapter 1. Some of these terms are as follows:

(a) "*Certificate of amendment*" is used in Chapter 3 to replace articles of amendment;[59]

(b) "*Certificate of merger*," "*certificate of exchange*," and "*certificate of conversion*" are used in Chapter 10 to replace articles of merger, articles of exchange and articles of conversion, respectively;[60]

(c) "*Certificate of termination*" is used in Chapter 11 and elsewhere in the Code to refer to the filing instrument that signifies the completion of winding up of any filing entity and replaces the articles of dissolution, certificate of cancellation or similar document;[61]

(d) Chapter 9 uses the term "*application for registration*" for foreign filing entities applying to do business in Texas and replaces the application for qualification to do business;[62] and

(e) In Title 3, the new term "*company agreement*" replaces the term "*regulations*" as used in the TLLCA with respect to limited liability companies.[63]

(f) Chapter 11 contains a number of new definitions that apply to concepts in that chapter. The terms "*winding up*" and "*termination*" are used instead of the confusing term "*dissolution*", which has various meanings under the source laws. "*Winding up*" is the process of winding up the business and affairs of a domestic entity as a result of an "*event requiring winding up*."[64] For a filing entity, "*termination*" refers to the cessation of existence by the filing of a certificate of termination upon the completion of the winding up process.[65] The term "*terminated entity*" is used to refer to a domestic entity following its termination or when its existence has been forfeited pursuant to the Tax Code.[66] The phrase "*event requiring winding up*" refers to any of a number of events or occurrences that require the domestic entity to start the process of winding up under Chapter 11, as set forth in Section 11.051.[67]

(g) In Chapter 21, Subchapter G, the term "*distribution limit*" is introduced to include some of the legal limits on distributions and repurchases of shares by a domestic for-profit corporation.[68] These limits are similar to those contained in the TBCA but are subsumed within the definition rather than being contained in other provisions.

(h) Title 7 introduces the term "*authorized person*" with respect to professional entities in order to specify what kind of professional entity and/or professional individual can own each different type of professional entity.[69]

VIII. KEY DEFINITIONS FOR FUNDAMENTAL BUSINESS TRANSACTIONS

55 C.S.H.B. 1737, Sec. 1; TBOC §1.002(69-a).

56 C.S.H.B. 1737, Sec. 9; TBOC §3.005(a).

57 C.S.H.B. 1737, Secs. 63, 67, 108, 109, 110, 111, 112, 123; TBOC §§11.057, 11.152(b), 152.503(b), 152.602(b), 152.608(a), 152.611(a), 152.709, 153.157.

58 S.B. 1447, Sec. 1; TBOC §1.002 (56-a), 56-b).

59 TBOC §§3.052-3.053.

60 TBOC §§10.151, 10.154.

61 TBOC §11.101.

62 TBOC §9.004.

63 TBOC §101.001(1).

64 TBOC §11.001(8).

65 TBOC §§11.101-11.103.

66 TBOC §11.001(4).

67 TBOC §11.001(2).

68 TBOC §21.301(1), (2).

69 TBOC §301.004.

The term "*fundamental business transaction*" is new and means a merger, interest exchange, conversion, or sale of all or substantially all of an entity's assets.[70] The term "*interest exchange*" is similar to the term "*share exchange*" as used in the TBCA but applies to exchanges of membership or ownership interests in all domestic entities.[71]

"*Certificate of merger*," "*certificate of exchange*," and "*certificate of conversion*" are used in Chapter 10 to replace articles of merger, articles of exchange and articles of conversion, as used in the prior statutes.[72]

The new term "*fundamental action*" is used in Chapters 21, 22 and 200 for for-profit corporations, non-profit corporations and real estate investment trusts, respectively, to refer to collectively amendments to the certificate of formation, voluntary decisions to wind up or to revoke a decision to wind up and other actions with respect to reinstatement of terminated domestic corporations and real estate investment trusts.[73] However, as used in Chapter 22 for non-profit corporations, the term also includes the types of transactions within the definition of "*fundamental business transaction*".[74] This new defined term allows these chapters of the Code to pull together in one section the provisions specifying the vote required for approval by the owners or members of the domestic entity to approve the fundamental action.

The term "*jurisdiction of formation*" is also new and refers to the state of Texas for domestic filing entities and, for a foreign entity for which a certificate of formation or similar organizational instrument is filed in connection with its formation, the jurisdiction in which the foreign entity's certificate of formation (or similar organizational document) is filed. In the case of a domestic nonfiling entity or a foreign entity for which a certificate of formation or similar organizational instrument is not filed in connection with its formation, "*jurisdiction of formation*" means the jurisdiction chosen in the entity's governing documents to govern its internal affairs if the jurisdiction bears a reasonable relation to the owners or members or to the entity's business and affairs under contract law principles or otherwise the jurisdiction in which the entity has its chief executive office.[75]

The Code carries over other key definitions from the source statutes relating to fundamental business transactions, with some revisions to adopt the new terminology of the Code. The term "*merger*" means a combination of one or more domestic entities with one or more domestic entities or non-code organizations resulting in: (i) one or more surviving domestic entities or non-code organizations; (ii) the creation of one or more new domestic entities or non-code organizations; or (iii) one or more surviving domestic entities or non-code organizations and the creation of one or more new domestic entities or non-code organizations. In addition, the term can also mean the division of a domestic entity into two or more new domestic entities or other organizations or into a surviving domestic entity and one or more new domestic or foreign entities or non-code organizations.[76] This latter type of merger is generally referred to as a "*divisive merger*" by practitioners and is unique to Texas law as compared to the merger laws in most other states, including Delaware.

The term "*conversion*" is defined to mean: (A) the continuance of a domestic entity as a non-code organization of any type; (B) the continuance of a non-code organization as a domestic entity of any type; or (C) the continuance of a domestic entity of one type as a domestic entity of another type.[77] As provided in new clauses (D) and (E) added to the definition in 2009 by S.B. 1442, the conversion transaction can basically substitute for what is referred to as a "domestication," "continuance" or "transfer" transaction in the laws of some other states, including Delaware. Thus, a Texas for-profit corporation can "convert" into a Delaware for-profit corporation under Texas law while from a Delaware standpoint such transaction might be viewed as a domestication of the Texas corporation into Delaware.

The term "*converted entity*" means an organization resulting from a conversion. The term "*converting entity*" means an organization as the organization existed before the organization's conversion.[78]

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70 TBOC §1.002(32).

71 TBOC §1.002(41).

72 TBOC §§10.151, 10.154.

73 TBOC §§21.364, 22.164, 200.261.

74 TBOC §22.164.

75 TBOC §1.002(43).

76 TBOC §1.002(55).

77 TBOC §1.002(10). S.B. 1442 amended the definition of "conversion" to add language acknowledging that a conversion transaction may be known by another name (i.e., domestication, continuance or transfer transaction) in a jurisdiction outside of Texas. The definition was also corrected to change references from "foreign entity" to "non-Code organization." The broader references reflect that a conversion transaction can occur in relation to any kind of organization, including a foreign entity.

78 TBOC §1.002(11) and (12). S.B. 1442 corrected these definitions to change references from "entity" to "organization" to reflect the broader set of organizations

The term "*interest exchange*" is defined to mean the acquisition of an ownership or membership interest in a domestic entity in accordance with Chapter 10, other than by means of a merger or conversion.[79]

The phrase "*party to a merger*" means a domestic entity or a non-code organization that under a plan of merger is divided or combined by a merger. The term does not include a domestic entity or a non-code organization that is not to be divided or combined into or with one or more domestic entities or non-code organizations, regardless of whether ownership interests of the entity are to be issued under the plan of merger.[80]

Because the special voting requirements for the sale of all or substantially all of the assets of a domestic entity are only applicable to certain types of domestic entities, the definition of the phrase "*sale of all or substantially all of the assets*" is contained in the separate titles governing those entities. The most detailed definitions of that phrase are located in the chapters governing for-profit corporations and real estate investment trusts. Thus, for example, that phrase, as defined in Chapter 21 governing for-profit corporations, means the sale, lease, exchange or other disposition, other than a pledge, mortgage, deed of trust or trust indenture unless otherwise provided by the certificate of formation, of all or substantially all of the property and assets of a domestic corporation that is not made in the usual and regular course of the corporation's business without regard to whether the disposition is made with the goodwill of the business. The term does not include a transaction that results in the corporation directly or indirectly continuing to engage in one or more businesses or applying a portion of the consideration received in connection with the transaction to the conduct of a business that the corporation engaged in after the transaction.[81]

Not all domestic entities provide to its owners the rights of dissent and appraisal in connection with a fundamental business transaction. A domestic entity that provides to its owners such rights under the Code or the governing documents of the entity is referred to as a "*domestic entity subject to dissenter's rights*."[82]

Those entities that provide rights of dissent and appraisal are identified in Subchapter H, Chapter 10 and include for-profit corporations, professional corporations, professional associations and real estate investment trusts.[83]

IX. SUMMARY OF TITLE 1

A. Chapter 1

Chapter 1 is divided into three subchapters relating to definitions and purposes, construction of the Code, and the determination of what laws are applicable to domestic and foreign entities.

Section 1.001 summarizes the purposes of the codification effected by the Code.

Section 1.002 contains many of the definitions used in the Code, especially in Title 1. See "V. New Vocabulary of the Code" above.

Section 1.006 contains useful provisions that indicate certain terms are synonymous when used in other statutes or codes. For example, a reference to "articles of incorporation" and "articles of organization" includes a "certificate of formation," and a reference to "articles of merger" includes a "certificate of merger." Additional synonymous terms have been added to Section 1.006 of the Code by H.B. 1737. This section was also clarified to state that the synonymous terms can be contained in the governing documents of the entity in addition to being contained in the provisions of another Texas statute or code. Additional terms or phrases that are now deemed to be synonymous include "certificate of cancellation," "incorporator," "certificate of authority to transact business," "regulations" and "business corporation." These terms or phrases have been connected with their corresponding terms or phrases in the Code.[84]

Section 1.008 provides terminology by which certain portions of the Code may be legally cited. For example, the provisions of Title 2 and Title 1 to the extent applicable to corporations may be cited as the "Texas Corporation Law." The provisions of Chapters 20 and 21 and Title 1 to the extent applicable to for-profit corporations may be cited as the "Texas For-Profit Corporation Law." The provisions of Chapters 151, 153 and 154 and Title 1 to the extent applicable to limited partnerships may be cited as the "Texas Limited Partnership Law." The provisions of Chapters 301, 302, 20 and 21 and Title 1 to the extent applicable to professional associations may be cited as the "Texas Professional Association Law." The portions of the Code applicable to other types of entities may be similarly cited.

Chapter 1 contains additional definitions which can be found in one or more existing Texas statutes

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that may be involved in a conversion transaction under the Code.

79 TBOC §1.002(41).

80 TBOC § 1.002(69).

81 TBOC § 21.451.

82 TBOC §1.002(19).

83 TBOC §10.351(b).

84 C.S.H.B. 1737, Sec. 2; TBOC §1.006.

and generally have the same meanings in the Code as in existing law.[85]

Section 1.051 specifies that Chapter 311 of the Government Code (i.e., the "Code Construction Act") applies to the construction of the Code. Those provisions also provide rules on how the Code's provisions should be interpreted in certain instances.

Subchapter C contains the choice of law provisions. These provisions state that the internal affairs of a foreign filing entity are governed by the law of the state of the jurisdiction where the entity is formed.[86] The laws of the State of Texas govern the internal affairs and formation of a domestic filing entity.[87] The entity's jurisdiction of formation governs the formation and internal affairs for nonfiling entities.[88]

Section 1.106 provides that if any provision of Title 1 of the Code (i.e., a general provisions) conflicts with a provision in another Title of the Code, the provision of the other Title will supersede the Title 1 provision.

B. Chapter 2

Chapter 2 is divided into two subchapters. The first subchapter specifies the general scope of permissible purposes of domestic entities. Generally, a domestic entity may have any lawful purpose or purposes unless otherwise provided by the Code.[89] A special section deals with nonprofit entities,[90] and another section limits the purposes of professional entities.[91] Certain prohibited purposes for domestic entities are also listed.[92]

Section 2.007 specifies certain prohibited activities for a for-profit corporation, while Section 2.008 requires any corporation formed for the purpose of operating a nonprofit institution to be a nonprofit corporation and not a for-profit corporation.[93] A special section addresses the purposes of a cooperative association formed under the Code.[94] Section 2.010 specifies certain activities that a nonprofit corporation may not conduct in Texas. The purposes of a real estate investment trust are cross-referenced to a provision in Chapter 3 which must be contained in the certificate of formation for that type of domestic entity.[95]

Subchapter B of Chapter 2 lists in broad terms the powers of domestic entities and was derived from similar provisions of the TBCA and TNPCA. A domestic entity has the same powers as an individual to take action necessary or convenient to carry out its business and affairs.[96] The powers to incur debt[97] and make guarantees[98] are also authorized and were derived from the TMCLA. Several sections deal with the power of a nonprofit corporation to serve as a trustee and to hold property in trust for an affiliated organization.[99] The common carrier powers of corporations, partnerships and limited liability companies engaged in certain pipeline businesses are reconfirmed.[100] Two sections deal with the powers and limitations on the powers of a cooperative association.[101] Section 2.107 contains the special federal income tax provisions required for private foundations as defined by Internal Revenue Code Section 509.

Section 2.113 clarifies that the Code does not authorize a domestic entity or a managerial official of a domestic entity to exercise a power in a manner that is inconsistent with its governing documents, the Code or other Texas law. Finally, one section is devoted to the authority of domestic entities to issue bonds or debentures in certificated form.[102]

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85 TBOC §§1.003 ("disinterested person"), 1.004 ("independent person"), 1.005 ("conspicuous"), 1.007 ("signed").

86 TBOC §1.102.

87 TBOC §1.101.

88 TBOC §1.103.

89 TBOC §2.001.

90 TBOC §2.002.

91 TBOC §2.004.

92 TBOC §2.003. S.B. 1442 eliminated both Section 2.003(2)(E) that prohibited a domestic entity formed under the Code from operating as a railroad company and Section 2.006 that allowed a limited subset of railroad companies to be formed under the Code. These provisions became outmoded as a result of changes in Title 112 of Texas Revised Civil Statutes effected in the 2007 Texas Legislature that eliminated a number of provisions permitting the formation of railroad companies under that statute. As a result, railroad companies can now be formed pursuant to the Code although they continue to be regulated by the provisions of Title 112 and other Texas laws in respect of their operations and powers. S.B. 1442, Secs. 2 and 73.

93 The term "nonprofit institution" specifically includes an institution devoted to a charitable, benevolent, religious, patriotic, civic, cultural, missionary, educational, scientific, social, fraternal, athletic or estetic purpose. TBOC §2.008.

94 TBOC §2.011.

95 TBOC §2.012.

96 TBOC §2.101.

97 TBOC §2.103.

98 TBOC §2.104.

99 TBOC §§2.102, 2.106.

100 TBOC §2.105; see Sections 111.019-111.022 of the Natural Resources Code.

101 TBOC §§2.110, 2.111.

102 TBOC §2.114.

C. Chapter 3

Chapter 3 is divided into five subchapters. The first subchapter provides the rules for formation of filing and non-filing entities. The Code establishes a new presumption that entities have a perpetual duration unless stated otherwise in the governing documents of the entity.[103] A filing entity is formed by filing a certificate of formation.[104] A nonfiling entity is formed in the manner specified in the title of the Code that applies to the nonfiling entity.[105] Thus, Title 4 governs the formation of a general partnership. Standardized provisions for certificates of formation are set forth in Subchapter A.[106] Code Section 3.005 contains two special provisions for limited partnerships that authorize omission of information from the certificate of formation of a limited partnership. Specifically, the certificate of formation for a limited partnership need not include the purposes for which it is formed and need not state its period of duration if it does not exist perpetually. These items were not required for the certificate of limited partnership under the TRLPA and, therefore, were not included specifically for certificates of formation in the Code with respect to limited partnerships.

Section 3.007 contains the additional provisions required in the certificate of formation of a for-profit corporation. For example, the provisions regarding shares of capital stock must be included. H.B. 1737 clarified that professional corporations must also include in their certificates of formation the supplemental provisions that are required for for-profit corporations, including for example the capital share structure.[107] Close corporations and nonprofit corporations also have sections devoted to their required supplemental provisions in the certificate of formation.[108] There are also special sections devoted to the supplemental provisions required in certificates of formation for real estate investment trusts,[109] cooperative associations,[110] professional entities[111] and professional associations.[112]

In 2007, H.B. 1737 restored certain content requirements for the certificate of formation of a professional association that were erroneously omitted in the drafting process. The omitted information that has been restored includes whether a professional association is to be governed by a board of directors or by an executive committee and the name and address of each person who will serve as the initial member of the board of directors of the executive committee.[113] The certificate of formation of a professional association providing for shares must also include information regarding shares.[114]

H.B. 1737 also deleted an outmoded requirement that the certificate of formation of a professional association must state that a member may not dissolve the association independently of other members of the association. This language was originally included in the TPAA to ensure that a professional association would be classified as a corporation under federal income tax classification rules. These rules have since been simplified and the language requirement has become outmoded.[115]

Section 3.011 of the Code adds the requirement to form a limited partnership that the partners must enter into a partnership agreement. It also sets forth the supplemental provisions for the certificate of formation of a limited partnership. The certificate of formation for a limited partnership must include the address of the principal office of the partnership in the United States where required records are to be kept or made available.

Section 3.010 specifies that supplemental provisions required in the certificate of formation of a limited liability company. Professional limited liability companies must include in their certificates of formation the supplemental provisions required by Section 3.014.

The provisions for amendments and restatements of certificates of formation are standardized for all filing entities and contained in Subchapter B. Section 3.053 specifies the contents of a certificate of amendment for a filing entity, while Section 3.052 refers to the specific Title of the Code that applies to the entity for the procedure to adopt an amendment to the certificate of formation. The amendment becomes effective when the filing of the certificate of amendment takes effect in accordance with Chapter 4 of the Code.[116]

Section 3.059 specifies the contents of a restated certificate of formation. The restated certificate of formation also takes effect when its filing is effective as provided by Chapter 4 of the Code.[117] Various

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103 TBOC §3.003.

104 TBOC §3.001.

105 TBOC §3.002.

106 TBOC §3.005.

107 C.S.H.B. 1737, Secs. 10, 11; TBOC §§3.007, 3.008.

108 TBOC §§3.008, 3.009.

109 TBOC §3.012.

110 TBOC §3.013.

111 TBOC §3.014.

112 TBOC §3.015.

113 C.S.H. 1737, Sec. 12; TBOC §3.015(a).

114 *Id.* §3.015(c).

115 *Id.* §3.015(a).

116 TBOC §3.056.

117 TBOC §3.063.

sections specify the supplemental provisions for a restated certificate of formation of for-profit corporations, nonprofit corporations and real estate investment trusts.[118]

The governing authority of a domestic entity manages and directs its business and affairs subject to applicable Code provisions and its governing documents.[119] General rules permitting officers and governing persons to rely on certain types of information or advice in making decisions are contained in Subchapter C.[120] General provisions about appointment and removal of officers and their duties are also contained in Subchapter C.[121]

General rules regarding the obligations of filing entities to maintain books and records[122] and a governing person's right to inspect these books and records[123] are contained in Subchapter D. The general provisions in Section 3.152 granting the governing person a right to examine the filing entity's books and records do not apply to a limited partnership. Section 153.552 contains alternative provisions requiring a limited partnership to make its records available to a partner or assignee of a partnership interest under certain circumstances.

Section 3.153 provides to each owner or member of a filing entity the right to examine the books and records of the filing entity to the extent provided by the governing documents of the entity and the title of the Code governing the filing entity.[124] Section 152.212 governs the rights of partners, or their agents or attorneys, to access the books and records of a general partnership, and supersedes the provisions of Sections 3.152 and 3.153 to the extent they conflict.[125] General rules regarding certificated and uncertified ownership interests have also been added as Subchapter E.[126] They apply to entities other than limited liability companies and partnerships, both of which could adopt these rules in their governing documents.[127] S.B. 1442 added a new subsection (f) to Section 3.202 of the Code to prohibit ownership interest certificates from being issued in bearer form. Bearer form certificates have no registered owners. Bearer form certificates have been criticized by federal and other law enforcement agencies as a means to avoid disclosure of actual ownership of entities to prevent discovery of the persons responsible for illegal activities by the culpable entity.[128]

S.B. 1442 added a new Subchapter F to Chapter 3 that authorizes emergency provisions in the governing documents of domestic entities that are triggered by some catastrophic event. An emergency exists if a majority of the domestic entity's governing persons cannot readily participate in a meeting because of the catastrophic event. The emergency provisions may make all provisions necessary for managing a domestic entity during the emergency. The emergency provisions are effective only during the emergency and not after the emergency ends. The entity's action taken in good faith in accordance with the emergency provisions binds the domestic entity and may not be used to impose liability on a managerial official, employee or agent of the domestic entity.[129]

Much of Chapter 3 applies only to filing entities and will not apply to general partnerships. With the exception of a few sections in Subchapter A,[130] Subchapter C is the only subchapter of Title 3 that applies to general partnerships.

D. Chapter 4

Chapter 4 is divided into four subchapters. Subchapter A contains standardized rules for filing of instruments with the Secretary of State[131] or, for a real estate investment trust, with the clerk of the county in which the principal office is located in Texas.[132] These provisions contemplate electronic filings.[133] The filing officer no longer will be required to issue a "certificate of incorporation," etc., but instead would issue an "acknowledgment" of the filing.[134] S.B. 1442 added new subsections (d) and (e) to Section 4.005 to clarify that a certificate issued by the Secretary of State to the effect that a domestic filing entity is in existence or that a foreign filing entity is in existence or registered may be relied upon as conclusive evidence that the domestic filing entity is in existence

118 TBOC §3.060-3.062.

119 TBOC §3.101.

120 TBOC §§3.102, 3.105.

121 TBOC §§3.103, 3.104.

122 TBOC §3.151.

123 TBOC §3.152.

124 TBOC §3.153.

125 See TBOC §1.106.

126 TBOC §§3.201-3.205.

127 TBOC §3.201(d).

128 S.B. 1442, Sec. 3.

129 S.B. 1442, Sec. 4; TBOC §§3.251-3.255.

130 TBOC §§3.002, 3.003.

131 TBOC §§4.001-4.003.

132 TBOC §4.009.

133 TBOC §4.003.

134 TBOC §4.002.

or that the foreign filing entity is registered and authorized to transact business in this state.[135]

Section 4.007 specifies that a person may recover damages, court costs and reasonable attorneys' fees if the person incurs a loss caused by a forged filing instrument or a filed filing instrument that violates the criminal provisions of Section 4.008. The person can also recover if the person reasonably relies on a false statement of material fact in a filed filing instrument or the omission in a filed filing instrument of a material fact required to be included in the instrument by the Code. The recovery may be obtained from the forger, any managerial official who directed the signing and filing of the filing instrument with knowledge of its falsity or the entity that authorizes the filing of the filing instrument.[136] Section 4.008 provides for a class A misdemeanor if a person signs or directs the filing of a filing instrument that the person knows is materially false, except that the offense is a state jail felony if the action with the intent to defraud or harm another.

A filing instrument takes effect on filing unless the filing instrument itself specifies that its effectiveness will be delayed until a future event or fact.[137] These provisions in Subchapter B regarding delayed effectiveness are derived from the TBCA and TNPCA.

Subchapter C permits corrections and amendments of filings and is derived primarily from the TMCLA and TRLPA Sec. 2.13.[138]

Subchapter D specifies all of the filing fees in one place for each of the different types of entities.[139] The fees are generally standardized as between entities. A summary of the changes between existing filing fees and filing fees under the Code is attached as Appendix A to this paper.

E. Chapter 5

Chapter 5 is divided into six subchapters. Most of the provisions of Chapter 5 apply only to filing entities and foreign filing entities and, therefore, do not apply to general partnerships, except for foreign limited liability partnerships that must register to do business in Texas.[140] The first subchapter specifies that trademark law must be complied with notwithstanding any compliance with the provisions of Chapter 5.[141]

Subchapter B contains the Code provisions relating to the names of entities. These provisions specify the requirements for names of each different type of entity and prohibitions on the use of certain names.[142] H.B. 1737 clarified that foreign entities must meet the same name requirements as domestic entities.[143]

Subchapters C and D contain provisions regarding registration and reservation of names.[144] These provisions are derived primarily from the TBCA.

Finally, Subchapter E contains the general provisions relating to registered agents and registered offices,[145] while Subchapter F covers agents for service of process and notices.[146] These provisions are derived from each of the existing Texas statutes covering filing entities. H.B. 1737 clarified that any type of organization registered or authorized to do business in Texas can act as a registered agent of a domestic entity. Previously, the language was limited to a domestic entity or a foreign entity.[147]

F. Chapter 6

Chapter 6 is divided into seven subchapters and sets forth general rules for meetings, record dates, voting, actions by written consent and voting agreements. These general rules do not apply to partnerships except to the extent their governing documents specify.[148] H.B. 1737 made a number of changes throughout Chapter 6 to clarify that the Chapter applies primarily to domestic entities as opposed to foreign entities. This was the original intent of the Code, but some confusion on this issue had been raised by some commentators.

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135 S.B. 1442, Sec. 5. The provisions are based in part on Section 1.28(c) of the Model Business Corporation Act ("MBCA").

136 TBOC §4.007.

137 TBOC §§4.051-4.059.

138 TBOC §§4.101-4.106.

139 TBOC §§4.151-4.161.

140 H.B. 1319 clarifies that a foreign limited liability partnership is not considered a foreign filing entity. However, most of Chapter 5 continues to apply to foreign limited liability partnerships. Code Section 152.904 requires that a foreign limited liability partnership must maintain a registered office and registered agent in the State of Texas in accordance with Chapter 5. In addition, as revised by H.B. 1319, Section 152.904 requires the application of Subchapters E and F of Chapter 5 to foreign limited liability partnerships to the same extent those subchapters apply to a foreign filing entity.

141 TBOC §5.001.

142 TBOC §§5.051-5.063.

143 C.S.H.B. 1737, Sections 20-26; TBOC §§5.054, 5.055, 5.057, 5.058, 5.059.

144 TBOC §§5.101-5.106, 5.151-5.155.

145 TBOC §§5.201-5.204.

146 TBOC §§5.251-5.257.

147 C.S.H.B. 1737, Sec. 28; TBOC §5.201(b).

148 TBOC §6.301.

Subchapter A specifies rules for locations of meetings of owners, members or governing persons.[149] Use of conference telephone or other communications equipment for the holding of meetings is authorized.[150] Examples of other communications equipment include videoconferencing technology or the internet. If used, such communications equipment or system must permit each person participating in the meeting to communicate with all the other persons participating in the meeting. If voting is to take place at the meeting, the entity must implement reasonable measures to verify that each person voting at the meeting by means of remote communication is sufficiently identified and must keep a record of any vote or other action taken.[151] Participation in a meeting constitutes presence at the meeting unless the participation is for the express purpose of objecting to the meeting on the basis that it has not been lawfully called or convened.[152]

Subchapter B sets forth the general notice requirements for meetings. The location of the meeting must be specified in the notice of the meeting if it is not held solely by using a conference telephone or other communication system authorized by Section 6.002. If the meeting is held solely or in part by using a conference telephone or other communication system, the form of communication system to be used for the meeting and the means of accessing the communication system must be included in the notice. Notices of meetings that are transmitted by facsimile or electronic message are considered to be given when the facsimile or electronic message is transmitted to a facsimile number or an electronic message address provided by the person, or to which the person consents for the purpose of receiving notice.[153]

Meeting notices may be waived. Participation in or attendance at the meeting can constitute a waiver of notice of the meeting, as well as notice of the particular matters to be discussed at the meeting.[154] In addition, notices need not be given if they have been returned undelivered to a person's address, in general, with respect to two consecutive annual meetings. In addition, notice of a meeting is not required to be given to an owner or member when the notice requirements are subject to the Securities Exchange Act of 1934, as amended, and the person entitled to notice of the meeting is considered a lost security holder under that Act and its related regulations.[155]

Record dates for meetings and for actions by written consent are addressed by Subchapter C.[156]

Subchapter D refers to the governing documents of the entity for the manner of voting of interests in a domestic entity.[157] In addition, Subchapter D sets forth rules for voting of pledged ownership interests,[158] ownership interests held by a receiver, estate or trust,[159] or with respect to ownership interests owned by the issuer entity or by another entity.[160]

Subchapter E authorizes written consents of owners, members or governing persons of filing entities.[161] Action may also be taken by less than unanimous consent if authorized by the certificate of formation.[162] Photographic, photostatic or facsimile reproductions of a written consent, as well as electronic transmissions of a consent, are deemed effective under certain conditions.[163]

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149 TBOC §§6.001-6.003.

150 TBOC §6.002.

151 TBOC §6.002(b).

152 TBOC §6.003.

153 TBOC §6.051. This provision was clarified by H.B. 1737 to specify that the facsimile number or electronic address must be provided or consented to by the recipient for the purpose of receiving notice. With this amendment, notices by consented to electronic transmission, including facsimile, are generally treated like notices by mail, and need not actually be received by the person to whom a notice is directed. This change makes the language parallel the source provisions in the TBCA giving notices to shareholders and directors. C.S.H.B. 1737, Sec. 30; TBOC §6.051(b).

154 TBOC §6.052. A new subsection (d) was added by S.B. 1442 to clarify that a person's participation or attendance at a meeting constitutes a waiver of notice of a particular matter at the meeting that is not within the purposes or business described in the meeting notice unless the person objects to considering the matter when it is presented. This provision would prevent a participating or attending person from challenging approval of a matter because it was not included in the meeting notice. The provision is based on Section 7.06(b)(2) of the MBCA. S.B. 1442, Sec. 7.

155 TBOC §6.053.

156 TBOC §§6.101-6.103.

157 TBOC §6.151.

158 TBOC §6.156.

159 TBOC §§6.154-6.155.

160 TBOC §§6.152-6.153.

161 TBOC §§6.201-6.205.

162 TBOC §6.202.

163 TBOC §6.205. S.B. 1442 added new subsections (b) and (c) to Section 6.205 to clarify that an electronic transmission by an owner, member or governing person of such a consent is considered a signed writing if the electronic transmission contains or is accompanied by information from which it can be determined that the transmission was transmitted by such person and the date of the transmission. This provision is based on similar provisions in TBCA Art. 9.10.B. S.B. 1442, Sec. 8.

Subchapter F authorizes voting trusts and voting agreements and is derived primarily from the TBCA.[164]

Subchapter G excludes partnerships from Chapter 6 except to the extent its governing documents specify.[165] It also provides that Subchapters C and D do not apply to limited liability companies except to the extent their governing documents specify.[166]

G. Chapter 7

Chapter 7 has no subchapters and contains only one section. Section 7.001 limits the liability of governing persons for monetary damages except in certain limited instances involving a bad faith breach of duty, a statutory prohibition, a knowing violation of law or disloyalty to the entity. The chapter applies to domestic entities other than partnerships and limited liability companies. Subsection 7.001(d) specifically recognizes that the liability of a governing person may be limited or restricted in a general partnership to the extent permitted by Chapter 152, in a limited partnership to the extent permitted under Chapter 153 and, to the extent applicable limited partnerships, Chapter 152, and in a limited liability company to the extent permitted under Section 101.401. Each of these other provisions of the Code contains more specific provisions applicable to those types of entities in regard to the liability of their governing persons.

H. Chapter 8

Chapter 8 is divided into four subchapters. The provisions of Chapter 8 relate to indemnification of governing persons, officers and other persons by domestic entities. These provisions are generally non-substantive revisions of existing provisions found in the TBCA, TNPCA, TREITA and TRLPA and have been made applicable to most domestic entities to achieve standardization.

Section 8.002 of Subchapter A specifies that Chapter 8 does not apply to a general partnership or limited liability company unless its governing documents adopt the provisions of Chapter 4. In addition, the governing documents of a general partnership and limited liability company, according to Section 8.002, may contain provisions, which will be enforceable, relating to indemnification, advancement of expenses or insurance or another arrangement to indemnify or hold harmless a governing person.

Subchapter A also contains definitions used in Chapter 8[167] and authorizes limitations on the power to indemnify in the certificate of formation (or partnership agreement for a limited partnership).[168] The Subchapter also states that, with one exception, a provision for an enterprise to indemnify a governing person is valid only to the extent consistent with Chapter 8.[169]

Subchapter B contains provisions regarding mandatory or court-ordered indemnification.[170]

Subchapter C addresses the standards and procedures for permissive indemnification and advancement of expenses for governing persons, former governing persons and delegates. Section 8.101 specifies that a determination must be made in accordance with Section 8.103 that the person being indemnified acted in good faith and with reasonable belief that the person's conduct was in the enterprise's best interest and, in the case of criminal proceeding, that the person did not have reasonable cause to believe the person's conduct was unlawful. Section 8.103 specifies that the disinterested and independent governing persons may make the determination required by Section 8.101. In addition, other parties that may make the determination are special legal counsel selected by the governing authority of the enterprise, a majority vote of a committee of the governing authority, the owners or members of the enterprise in a vote that excludes the ownership or membership interest held by each governing person who is not disinterested and independent, or a unanimous vote of the owners or members of the enterprise.[171] Section 8.102 contains limitations on when a person can be indemnified, including in particular, when a person is found liable to the enterprise or is found liable because the person improperly received a personal benefit.

Section 8.104 contains provisions relating to when an enterprise may pay or reimburse reasonable expenses of a present governing person or delegate. Section 8.105 specifies when an enterprise may indemnify in advance expenses to a person who is not

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164 TBOC §§6.251-6.252.

165 TBOC §6.301.

166 TBOC §6.302.

167 TBOC §8.001.

168 TBOC §8.003.

169 TBOC § 8.004.

170 TBOC §§8.051-8.052.

171 See TBOC §§1.003 and 1.004 for definitions of what kinds of persons are considered to be "disinterested" and "independent." H.B. 1737 restored a provision that was not carried over from the TRLPA by specifying that limited partners, by a vote of a majority in interest, may make a determination approving an indemnification. The vote excludes the interest held by each general partner who is not disinterested and independent. C.S.H.B. 1737, Sec. 41, 42; TBOC §§8.103(d), 8.104(b).

a governing person of the enterprise, including an officer, employee or agent.[172] Finally, an enterprise may pay or reimburse reasonable expenses incurred by any person in connection with his or her appearance as a witness.[173]

Subchapter D authorizes entities to purchase insurance and make other funding arrangements to provide protection to governing persons and other persons who might otherwise be indemnified.[174] Reports on indemnification and advances of expenses must also be made to owners on an annual basis.[175]

I. Chapter 9

Chapter 9 is divided into seven subchapters and provides the rules and procedures for registration of foreign entities to transact business in Texas. Because Chapter 9 for the most part governs filing entities, most of its provisions do not apply to general partnerships, except as to foreign limited liability partnerships.[176]

Subchapter A requires any foreign entity that affords limited liability under the law of its jurisdiction of formation for any owner or member to register under Chapter 9 to transact business in Texas.[177] Foreign entities that do not afford limited liability to their owners or members under the law of their jurisdiction of formation, foreign entities registered under other Texas law, and foreign unincorporated nonprofit associations are not required to register under the Code to transact business in Texas.[178] This Subchapter also contains provisions regarding the procedures for and effects of registration and amendments and voluntary withdrawal of registration.[179] Section 9.007 governs the registration of foreign limited liability partnerships. Foreign nonprofit corporations must include supplemental information in their applications for registration.[180]

Section 9.005 requires supplemental information in an application for registration by a foreign limited liability company whose company agreement establishes or provides for the establishment of designated series of members, managers, membership interests or assets. This provision was added by S.B. 1442 in connection with the new Subchapter M added by that bill to Chapter 101 governing series LLC's and is modeled on Section 18-215(n) of the Delaware Limited Liability Company Act (the "DLLCA").[181]

Section 9.012, which was added by S.B. 1442, eliminates an unnecessary filing instrument in connection with a conversion of a foreign filing entity or foreign limited liability partnership into a domestic filing entity. A formal withdrawal of the registration of the foreign entity is no longer needed to be filed, because the filing of the certificate of conversion sufficiently indicates the status of the converting foreign entity.[182]

Subchapter B authorizes civil penalties and collection by the Secretary of State of late filing fees when a foreign filing entity transacts business in Texas without being registered.[183] Court actions may not be maintained while not properly registered.[184]

Subchapter C sets forth procedures relating to revocation of registration by the Secretary of State and reinstatement of registration.[185]

Subchapter D contains provision regarding revocation of registration by state action or court action that are standardized across entities.[186] H.B.

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172 TBOC §8.105.

173 TBOC §8.106.

174 TBOC §8.151.

175 TBOC §8.152.

176 H.B. 1319 revised Section 9.007 of the Code to change the focus of that section from supplying supplemental information for the application for registration of a foreign limited liability partnership to specifying the entire contents of an application for registration by a foreign limited liability partnership. This change is necessitated by the fact that foreign limited partnerships are not considered foreign filing entities for purposes of the Code's provisions. The effect of registration of a foreign limited liability partnership is not governed by Chapter 9 but instead is governed by Subchapter K of Chapter 152. Various other sections in Chapter 9 have been amended to specifically include references to foreign limited liability partnerships in addition to the reference to foreign filing entities so that such provisions remain applicable to them notwithstanding their elimination from the definition of foreign filing entity.

177 TBOC §9.001.

178 TBOC §9.002.

179 TBOC §§9.004, 9.008-9.009, 9.011.

180 TBOC §9.006.

181 S.B. 1442, Sec. 9.

182 S.B. 1442, Sec. 12.

183 TBOC §§9.052, 9.054. H.B. 1737 clarified the formula for the late filing fees payable by a foreign filing entity that fails to register to do business within a 90-day grace period after commencement of business in Texas. The late filing fee equals the product of the amount of the registration fee for the entity times the total number of calendar years, including any partial calendar year, that the entity transacted business in Texas without having registered. The grace period for failure to pay a filing fee in connection with a filing of a registration to do business by a foreign filing entity has also been clarified to be 15 days. C.S.H.B. 1737, Sec. 46; TBOC §9.054.

184 TBOC §9.051.

185 TBOC §§9.101-9.106.

186 TBOC §§9.151-9.162.

1319 added a new Section 9.162 to the Code to clarify that foreign limited liability partnerships, even though they are not considered foreign filing entities, are subject to the provisions of Subchapter D, to the same extent as though they were foreign filing entities.

Subchapter E provides that a foreign entity cannot conduct in Texas a business or activity that is not permitted by the Code to be transacted by the corresponding domestic entity.[187] Otherwise, a foreign entity enjoys the same rights, privileges and obligations as the corresponding domestic entity and the members, owners or managerial officials are subject to the same duties, restrictions and liabilities that are imposed on members, owners or managerial officials of a corresponding domestic entity, subject to the laws of the this state and the provisions of Subchapter C of Chapter 1.[188] H.B. 1737 clarified that a foreign business trust may engage in a business or activity permitted to be transacted by a limited liability company and is not limited to the business activities permitted for a real estate investment trust.[189]

Subchapter F contains the important provisions specifying what particular activities do not constitute transacting business in Texas.[190] S.B. 1442 added a new subdivision (15) to Section 9.251 to provide that mere ownership of real or personal property in Texas, without more, will not constitute transaction of business in Texas for the purposes of the requirement to register to do business under Chapter 9.[191] This provision is based on Section 15.01 of the Model Business Corporation Act ("MBCA").

Subchapter G clarifies the interaction between the Code and other statutes that grant authority to foreign entities to transact business in Texas.[192]

J. Chapter 10

Chapter 10 has nine subchapters and is the longest Chapter in Title 1. Chapter 10 relates to mergers, interest exchanges, conversions and sales of assets. As a result of changes effected by prior Texas legislative sessions, the language relating to mergers, interest exchanges and conversions was similar across most of the main prior Texas statutes.

Subchapter A sets forth the rules for adoption of plans of merger,[193] contents of plans of merger[194] and effects of a merger.[195] Special provisions are also contained in Subchapter A relating to partnership mergers,[196] non-profit corporation mergers,[197] short form mergers[198] and mergers creating holding companies.[199] Section 10.005 governing mergers creating holding companies does not apply to partnerships. Section 10.006 governing short form mergers does not apply if a subsidiary organization that is a party to the merger is a partnership.

Section 10.009 contains a number of special provisions relating to partnerships. In particular, included in these provisions is a requirement that the partnership agreement must contain provisions that authorize the merger provided for in the plan of merger adopted by the partnership. These special provisions are similar to special provisions contained in the TRLPA and TRPA.

Section 10.010 contains special limitations on mergers involving non-profit corporations and should be carefully reviewed before a non-profit corporation effects a merger.

Subchapter B provides the rules for adoption and contents of plans of exchange[200] and the effect of an exchange.[201] Section 10.056 applies specifically to partnerships and requires that the partnership agreement of each domestic partnership whose partnership interests are to be acquired pursuant to the plan of exchange must authorize the partnership interest exchange adopted by the partnership. All action required by the partnership agreement to approve the interest exchange must be taken in order to effect the exchange.

Subchapter C provides the rules for adoption and contents of plans of conversion and the effect of a conversion.[202] Special provisions are set forth for partnership conversions, non-profit corporation conversions and conversion and continuance transactions Section 10.107 applies specifically to partnerships and requires that the partnership agreement of each domestic partnership that is converting pursuant to the plan of conversion must authorize the partnership conversion adopted by the partnership. All action required by the partnership agreement to approve the conversion must be taken in order to effect the conversion. Section 10.108

187 TBOC §9.201.

188 TBOC §§9.202-9.203.

189 C.S.H.B. 1737, Sec. 48; TBOC §9.201.

190 TBOC §9.251.

191 S.B. 1442, Sec. 14.

192 TBOC §9.301.

193 TBOC §10.001.

194 TBOC §§10.002-10.004.

195 TBOC §10.008.

196 TBOC §10.009.

197 TBOC §10.010.

198 TBOC §10.006.

199 TBOC §10.005.

200 TBOC §§10.051-10.053.

201 TBOC §10.055.

202 TBOC §§10.101-10.106.

prohibits the conversion of a non-profit corporation into a for-profit entity.

Subchapter D provides the requirements for the contents and filing of certificates of merger, exchange or conversion.[203] H.B. 1737 clarified Section 10.151 to add a requirement to list in a certificate of merger or exchange the organizational form of each domestic entity or non-Code organization that is a party to the merger or exchange or to be created by the plan of merger.[204] H.B. 1737 also clarified that the certificate of conversion must also include the name, jurisdiction of formation and the organizational form of the converted entity.[205] These changes corrected informational gaps in the Code and the source statutes, although these requirements were implied in the prior provisions and followed customary practice of legal practitioners in this area.

Subchapter E provides standard rules for abandonment of a plan of merger, exchange or conversion.[206]

Subchapter F authorizes domestic entities to sell, lease or convey property[207] and clarifies standard rules for what kinds of approvals are required for certain property dispositions.[208] The requirements for signing a deed or conveyance are also set forth in this subchapter.[209]

Subchapter G contains provisions intended to coordinate the Code with federal bankruptcy reorganization laws.[210] These provisions are derived primarily from the TBCA and TNPCA.

Subchapter H provides the rules and procedures for dissent and appraisal by owners with respect to a plan of merger, exchange or conversion or a sale of all or substantially all the assets of a domestic entity.[211] This subchapter only applies to domestic for-profit corporations, professional corporations, professional associations and real estate investment trusts.[212] Subchapter H does not apply to partnerships and limited liability companies unless their governing documents adopt the provisions of the subchapter.[213]

H.B. 1737 clarified that the governing documents of a partnership or limited liability company that adopt the rights of dissent and appraisal provided by Chapter 10 for owners of those kinds of entities may modify those rights in their governing documents.[214] H.B. 1737 also amended and clarified the manner of computing the fair value of an ownership interest under the dissenting appraisal procedures in Chapter 10. The changes clarified that no discount for lack of marketability should be taken into account in the computation of value. New language was added that elaborated on what was stated and implied in the prior language by specifying that the relative rights, preferences and limitations of different classes or a series of ownership interests, other than relative voting rights, should be taken into account in determining the fair value.[215] H.B. 1737 also clarified that the dissenting owner's rights under Chapter 10 are exclusive remedies for recovery of either the value of the ownership interest or money damages to the owner with respect to the action on which the vote was taken.[216] These changes restored the language in Chapter 10 to match the source provisions in the TBCA.

S.B. 1442 added a new subsection (g) to Section 10.361 to permit a beneficial owner of an ownership interest that is entitled to dissenters' rights to file a petition for appraisal.[217] An ownership interest is entitled to dissenters' rights only if the record or registered owner has taken the steps in Subchapter H to perfect those rights, and a petition for appraisal may be filed only if the dissenting record or registered owner and the entity responsible for satisfying the obligations to dissenters have not agreed on the fair market value of the ownership interest. If the dissenting record or registered owner is the trustee of a voting trust or other nominee holder of the ownership interest for a beneficial owner, the beneficial owner, as the person with the direct economic interest in the ownership interest entitled to dissenters' rights, is authorized to pursue the dissenters' rights by petitioning a court for appraisal.

The nominee holder of the ownership interest then need not serve as plaintiff in the appraisal action. This provision is based on a 2007 amendment to Section 262(e) of the Delaware General Corporation Law ("DGCL").

S.B. 1442 clarified Section 10.367(b) to specify the rights of a dissenting owner after the termination of the owner's right of dissent under that section. The owner's status as an owner of the owner's ownership interest is restored as if the owner's demand for

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203 TBOC §§10.151-10.156.

204 C.S.H.B. 1737, Sec. 53; TBOC §10.151(b).

205 C.S.H.B. 1737, Sec. 54; TBOC §10.154(b)

206 TBOC §§10.201-10.203.

207 TBOC §10.251.

208 TBOC §10.252.

209 TBOC §10.253.

210 TBOC §§10.301-10.306.

211 TBOC §§10.351-10.368.

212 TBOC §10.351(b).

213 TBOC §10.351(c).

214 C.S.H.B. 1737, Sec. 56; TBOC §10.351(c).

215 C.S.H.B. 1737, Sec. 57; TBOC §10.362(b).

216 C.S.H.B. 1737, Sec. 59; TBOC §10.368.

217 S.B. 1442, Sec. 19.

payment of the fair value of the ownership interest had not been made under Section 10.356. If the owner's ownership interest was cancelled, converted or exchanged as a result of the action or a subsequent action, the dissenting owner is entitled to receive the same cash, property, rights and other consideration received by the owners of the same class and series of ownership interests held by the owner as if the owner's demand for the payment of the fair market value of the ownership interest had not been made under Section 10.356. The validity of any actions of the domestic entity cannot be challenged because of the restoration of the owner's ownership interest or the other rights or entitlements of the owner under subsection (b). The dissenting owner is also entitled to receive any dividends or other distributions made with respect to his or her ownership interest as if the demand had not been made.[218]

Subchapter Z contains miscellaneous provisions regarding the effect of the Code on creditors and Texas antitrust laws and clarifies that Chapter 10 does not limit the power of a domestic entity to acquire its ownership or membership interests through voluntary exchange or otherwise.[219]

K. Chapter 11

Chapter 11 contains nine subchapters and relates to the winding up and termination of domestic entities. Subchapter A contains definitions that apply to Chapter 11.[220] The rules for winding up and termination are standardized across entities and derived primarily from the TBCA and TNPCA but also contain special provisions pulled from the existing partnership statutes. The adoption in the mid-1990's by the Internal Revenue Service of its "check-the-box" rules allowing for parties to elect partnership or corporate tax treatment for limited partnerships and limited liability companies has eliminated much of the need for different rules for different types of entities in this area.

Subchapter B specifies what events will require the winding up of a domestic entity.[221] The winding up procedures[222] and the priority of application of liquidation proceeds is specified in this Subchapter.[223] Section 11.057 contains special provisions that add additional events requiring winding up of a general partnership derived from the TRPA. Section 11.058 contains supplemental events requiring the winding up of a limited partnership which were derived from the TRLPA. Supplemental events requiring winding up of corporations and limited liability companies are also included.[224]

Subchapter C provides the requirements for the information to be contained in a certificate of termination to be filed by a filing entity upon completion of the winding up process.[225] The effective date of termination of the existence of a filing entity and nonfiling entity are also specified.[226]

Subchapter D authorizes revocation of a voluntary decision to wind up and the continuation of a domestic entity without winding up in certain circumstances.[227]

Subchapter E permits reinstatement of the existence of a terminated domestic entity in certain circumstances.[228] The procedures for reinstatement of nonfiling entities and filing entities and the effective date of the reinstatement are set forth.[229]

Subchapter F contains the procedures for termination of a filing entity by action of the Secretary of State[230] and reinstatement after an involuntary termination after correction of the circumstances that led to the involuntary termination.[231]

Subchapter G sets forth the rules and procedures for an involuntary winding up and termination of a filing entity by state action.[232] Specific grounds for termination are required. The domestic entity has a number of opportunities to cure the specific grounds.[233] Section 11.314 contains a special provision authorizing a district court in the county where a domestic partnership is located to order the winding up and termination of the partnership upon application by a partner under certain circumstances.

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218 S.B. 1442, Sec. 21. These changes are intended to clarify the provisions in response to an improper reading of the prior provisions by the court in *Sembera v. Petrofac Tyler, Inc.*, 253 S.W.3 815 (Tex. App.-Tyler 2008, pet. denied). The *Sembera* court improperly interpreted the phrase "restored without prejudice to any interim proceeding" in TBCA Article 5.13.C, which was similar to the prior language of Section 10.367(b), to create a condition precedent to the shareholder's rights to be restored in the ownership of his or her shares.

219 TBOC §§10.901-10.902.

220 TBOC §11.001.

221 TBOC §11.051.

222 TBOC §11.052.

223 TBOC §11.053.

224 TBOC §§11.056, 11.059.

225 TBOC §11.101.

226 TBOC §§11.102-11.103.

227 TBOC §§11.151-11.152.

228 TBOC §11.201.

229 TBOC §§11.202, 11.204-11.205.

230 TBOC §§11.251-11.252.

231 TBOC §11.253.

232 TBOC §§11.301-11.305.

233 TBOC §§11.306-11.307.

Subchapter H requires a terminating domestic entity to deposit with the comptroller any cash distribution to owners and creditors who are unknown or cannot be located.[234] Notices of the escheat must be published, and the comptroller is responsible to pay the escheated amount upon the filing of a proper claim.[235] A terminated domestic entity also survives for certain limited purposes, including defending actions, liquidating property, distributing property or its proceeds and settling affairs not completed before termination.[236] A procedure is also established for accelerating the resolution of existing claims and extinguishing existing claims following compliance with the required procedures.[237]

Subchapter I contains provisions relating to receivership of specific property or the entire business of domestic entities.[238] The provisions for ancillary receiverships of foreign entities are also included.[239]

Numerous changes were made by H.B. 1737 to Chapter 11 in order to clarify the preexisting language. The changes focused primarily on the provisions relating to partnerships and limited liability companies. In one general change, the crucial provisions in Section 11.051 defining the term "event requiring winding up" have been clarified to eliminate overlapping of the five subdivisions in this section.

The five categories of events requiring winding up, which correspond to subdivisions in Section 11.051, are: (1) expiration of any period of duration specified in domestic entity's governing documents, (2) a voluntary decision to wind up the domestic entity, (3) an event specified in the governing documents of a domestic entity requiring the winding up, dissolution or termination of the domestic entity, (4) an event specified in other sections of this Code requiring the winding up or termination of the domestic entity, or (5) a decree by a court requiring the winding up, dissolution or termination of the domestic entity rendered under the Code or other law. The subdivision dealing with the period of duration has been clarified to indicate that the period of duration must be specified in a domestic entity's governing documents in order to trigger an event requiring winding up by that subdivision.[240]

Supplemental events requiring winding up in Chapter 11 for limited liability companies, general partnerships and limited partnerships have also been substantially rewritten. The changes clarified how the various supplemental events fit into the separate categories of events requiring winding up. As a consequence of these changes, the following are deemed to be events requiring winding up under Section 11.051(4):

(a) termination of last remaining member of a domestic limited liability company;[241]
(b) completion of the particular undertaking of a general partnership for such undertaking, unless otherwise provided by the partnership agreement;
(c) an event making it illegal for all or substantially all of a general partnership's business to be continued, unless the illegality is cured before the 91st day after the date of notice to the partnership of the event;
(d) the sale of all or substantially all of the property of a general partnership outside the ordinary course of business, unless otherwise provided by the partnership agreement;[242]
(e) on the 60th day after a general partnership receives notice of a request for winding up the partnership from a partner, or a later date as specified by the request, unless a majority-in-interest of the partners deny the request or agree to continue the partnership (applies only if partnership does not have a period of duration, is not for a particular understanding and is not required under the partnership agreement to wind up);[243]
(f) an event of withdrawal of a general partner of a limited partnership unless otherwise provided in the partnership agreement;[244] and
(g) when there are no limited partners in the limited partnership.[245]

The changes also clarified that a voluntary decision to wind up (i.e. pursuant to TBOC §11.051(2)) (i) of a general partnership requires the express will of a majority-in-interest of the partners (limited to those partners who have not assigned their interests in the case of a partnership that has no period of duration and is not for a particular undertaking and whose partnership agreement does not provide for winding up on the occurrence of a specified event) unless otherwise provided by the partnership agreement;[246] and (ii) of a limited partnership requires the written

234 TBOC §11.352.

235 TBOC §§11.354-11.355.

236 TBOC §§11.356-11.357

237 TBOC §§11.358-11.359.

238 TBOC §§11.401-11.408, 11.411-11.414.

239 TBOC §§11.409-11.410.

240 C.S.H.B. 1737, Sec. 61; TBOC §11.051.

241 C.S.H.B. 1737, Sec. 62; TBOC §11.056.

242 C.S.H.B. 1737, Sec. 63; TBOC §11.057(c).

243 C.S.H.B. 1737, Sec. 63; TBOC §11.057(d).

244 C.S.H.B. 1737, Sec. 64; TBOC §11.058(b).

245 C.S.H.B. 1737, Sec. 64; TBOC §11.058(c).

246 C.S.H.B. 1737, Sec. 63; TBOC §11.057(a), (b).

consent of all partners unless otherwise provided by the partnership agreement.[247] The partnership supplemental provisions in Chapter 11 have also been clarified to indicate that most of the provisions can be modified by the partnership agreement.[248]

The revised language also clarified how the events requiring winding up limited partnerships and general partnerships can be cancelled or revoked under the Code in most cases.[249] Events requiring winding up of a general partnership listed in (b), (d) and (e) of the immediately preceding paragraph may be canceled in accordance with TBOC §§11.152 and 152.709.[250] A voluntary decision to wind up (i) a general partnership under TBOC §11.057(a) can be revoked under TBOC §§11.151 and 152.709(d) or (e),[251] or (ii) a limited partnership under TBOC §11.058(a) can be revoked under TBOC §§11.151 and 153.501(d).[252] An event requiring winding up of a limited partnership may be cancelled in accordance with (i) TBOC §§11.152(a) and 153.501(b) if arising from an event of withdrawal of a general partner, or (ii) TBOC §§11.152(a) and 153.501(e) if arising from when there are no limited partners.[253]

The flexibility for limited liability companies has been enhanced by creating a new right to cancel an event requiring winding up arising from the termination of membership of a company's last remaining member. To cancel the event requiring winding up, a newly added provision requires the legal representative or successor of the last remaining member, within one year after the event, to agree to cancel the event requiring winding up and continue the company and to become a member of the company or to designate another person who agrees to become a member of the company, in either case effective as of the date of the termination of the last remaining member.[254]

Similarly, in several substantive changes, the flexibility for general and limited partnerships has been enhanced by creating new rights to cancel events requiring winding up when there are no limited partners in a limited partnership, when all or substantially all of the assets of a general partnership have been sold, or upon a request of a partner in a general partnership. An event requiring winding up arising from the sale of all or substantially all of the property of a domestic general partnership can be canceled by all of the partners in the partnership agreeing to continue the partnership within one year after the event.[255] Similarly, all of the partners in a domestic general partnership can cancel an event requiring winding up arising from a request for winding up from a partner by agreeing to continue the partnership within one year after the event.[256] With respect to limited partnerships, an event requiring winding up for a limited partnership resulting when no limited partner remains can be canceled by a legal representative or successor of the last remaining limited partner and all of the general partners continuing the partnership within one year after the event so long as such representative or successor or its nominee or designee is admitted as a limited partner to the partnership. In the alternative, a limited partner can be admitted to the limited partnership in accordance with the partnership agreement effective as of the occurrence of the event that caused the last remaining limited partner to cease to be a limited partner.[257]

H.B. 1737 also clarified the partnership winding up provisions by specifying more clearly how (i) a general partnership may cancel an event requiring winding up arising from the expiration of the partnership's period of duration, the completion of the partnership's particular undertaking or the occurrence of an event specified in its partnership agreement as requiring the winding up of the partnership,[258] and (ii) a limited partnership may cancel an event requiring winding up arising from the expiration of its period of duration, from the occurrence of an event specified in its governing documents or from an event of withdrawal of a general partner.[259]

L. Chapter 12

Chapter 12 has four subchapters and contains provisions relating to administrative powers and procedures for the Secretary of State and Attorney General. The Texas Secretary of State is given the authority and power reasonably necessary for the Secretary of State to perform the duties imposed on it

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247 C.S.H.B. 1737, Sec. 64; TBOC §11.058(c).

248 C.S.H.B. 1737, Secs. 63, 64; TBOC §§11.057, 11.058.

249 C.S.H.B. 1737, Secs. 60, 62, 63, 64; TBOC §§11.001(6), 11.056, 11.057, 11.058.

250 C.S.H.B. 1737, Sec. 63; TBOC §11.057(e).

251 C.S.H.B. 1737, Sec. 64; TBOC §11.057(a), (b).

252 C.S.H.B. 1737, Sec. 63; TBOC §11.058(a).

253 C.S.H.B. 1737, Sec. 64; TBOC §11.057(b), (c).

254 C.S.H.B. 1737, Sec. 102; TBOC §§11.152(a), 101.552(c).

255 C.S.H.B. 1737, Sec. 112; TBOC §§11.152(a), 152.709(f).

256 C.S.H.B. 1737, Sec. 112; TBOC §§11.152(a), 152.709(c).

257 C.S.H.B. 1737, Sec. 126; TBOC §§11.152(a), 153.501(e).

258 C.S.H.B. 1737, Sec. 112; TBOC §152.709.

259 C.S.H.B. 1737, Sec. 126; TBOC §153.501.

under the Code.[260] The Secretary of State may adopt procedural rules for filing of instruments.[261] Interrogatories may be sent by the Secretary of State to a filing entity or foreign filing entity.[262] An appeal procedure is specified if the Secretary of State does not approve the filing of a filing instrument.[263]

Because most of the provisions of Chapter 12 apply only to filing entities, general partnerships are generally not subject to these provisions. In addition, S.B. 1442 added subsection (d) to Section 12.001 to clarify that Sections 12.001, 12.003 and 12.004 do not apply to domestic real estate investment trusts, because filing instruments relating to a real estate investment trust are generally not filed with the Secretary of State, but instead are filed with the county clerk of the county in which its principal place of business in Texas is located.[264]

Subchapter B authorizes the Attorney General to examine the books and records and make copies thereof in the performance of a power or duty of the Attorney General.[265] Penalties, including forfeiture of the right to do business in Texas, are specified if a managerial official fails or refuses to permit the Attorney General to investigate the entity or examine its records.[266]

Subchapter C specifies that a state has a lien on all property of a filing entity or foreign filing entity in Texas to collect a fine or penalty due the state under Chapter 12.[267]

Subchapter D contains provisions relating to the state's enforcement powers, including receivership, foreclosure of lien, examination and liquidation.[268]

M. Chart on Title 1 Applicability to Partnerships and LLC's.

The following chart is intended to summarize in general terms the applicability of various provisions of Title 1 of the Code to general partnerships and limited partnerships.

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[260] TBOC §12.001(b). S.B. 1442 added subsection (c) to Section 12.001 to confirm the authority of the Secretary of State to issue certificates evidencing filing of a filing instrument, a letter acknowledging the filing of an instrument or both a certificate and a letter. S.B. 1442, Sec 26.

[261] TBOC §12.001(a).

[262] TBOC §12.002.

[263] TBOC §12.004.

[264] S.B. 1442, Sec. 26.

[265] TBOC §§12.151-12.1153.

[266] TBOC §§12.155, 12.156. A criminal penalty of a Class B misdemeanor can also be imposed.

[267] TBOC §12.201.

[268] TBOC §§12.251-12.261.

Applicability of Title 1 to Partnerships and LLC's

Code Chapter	Applicability to General Partnerships[(1)]	Limited Partnerships	LLC's
1	Yes	Yes	Yes
2	Yes	Yes	Yes
3	Subchapters A & C; Subchapter E only if partnership agreement specifies	Yes, except Subchapter E only if partnership agreement specifies	Yes, except Subchapter E only if governing documents specify
4	Yes	Yes	Yes
5	LLP's only	Yes	Yes
6	No, except to the extent governing documents specify	No, except to the extent governing documents specify	Yes, except Subchapters C & D only if governing documents specify
7	No	No	No
8	No, unless adopted by governing documents	Yes	No, unless adopted by governing documents
9	Foreign LLP's; isolated provisions only for other general partnerships	Yes	Yes
10	Yes	Yes	Yes
11	Yes	Yes	Yes
12	Subchapter A only as to filing instruments	Yes	Yes

(1) Includes limited liability partnerships.

X. TITLE 2 – CORPORATIONS

A. General. Title 2 is divided into four Chapters. Chapter 20, the first chapter, contains only two sections that contain general provisions that apply to all types of corporations. These general provisions include provisions governing ultra vires acts[269] and the requirements for signing filing instruments by officers.[270]

B. For-Profit Corporations.

Chapter 21 is the main chapter that governs for-profit corporations and was derived entirely from the TBCA. Although the provisions are substantially reorganized and subdivided into separate sections as compared to the TBCA provisions, most of the provisions contain no substantive changes from the TBCA.

Subchapter A includes Section 21.002 which contains most of the definitions applicable to Chapter 21. Section 21.001 specifies that Chapter 21 applies to foreign for-profit corporations that do business in Texas regardless of whether they are registered to transact business in Texas.

Subchapter B contains provisions that supplement the provisions of Title 1, Chapter 3 regarding the procedures for approval of amendments to the certificate of formation[271] and approval of restated certificates of formation.[272] Subchapter B contains additional provisions relating to the formation of the corporation, including the requirement to adopt bylaws[273] and to have an organizational meeting of the initial directors.[274]

Subchapter C contains provisions relating to shareholders agreements.[275]

Subchapter D covers shares, options and convertible securities, the issuance of shares, the amount, value and sufficiency of consideration for issuance of shares, subscriptions for shares and establishment of series of shares.[276] Section 21.173 contains supplemental requirements for books and records in addition to those set forth in Section 3.151. The payment of expenses of organization, reorganization and sale of shares is also authorized.[277]

S.B. 1442 amended several sections to clarify that the certificate of formation must include a designation of rights of each class and series of shares only if more than one class or series of shares is authorized. The authorized classes and series of shares must collectively have general voting rights and the right to the residual corporate assets upon winding up and termination. If more than one class or series of shares is authorized, these two fundamental rights need not be in a single class or series of shares. If only one class of shares is authorized, those shares must have the two fundamental rights, but the certificate of formation does not need to so state. The new language is modeled after Section 6.01(b) of the MBCA.[278] S.B. 1442 also clarified that a for-profit corporation may issue shares into escrow when the consideration is future services or benefits, or a promissory note payable, to the corporation.[279]

Subchapter E relates to the rights and liabilities of shareholders[280] and transfers and restrictions on transfers of shares.[281] This subchapter also provides penalties for officers and agents who fail to comply with certain provisions relating to shareholders' rights.[282] Provisions regarding the liability of shareholders for corporate obligations also are contained in this subchapter.[283] The provisions regarding preemptive rights of shareholders were changed in the Code to provide that shareholders do not have preemptive rights unless the articles of incorporation provide that they do.[284] This change reversed the provisions in the TBCA that

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269 TBOC §20.002.

270 TBOC §20.001.

271 TBOC §§21.052-21.055.

272 TBOC §21.056.

273 TBOC §21.057.

274 TBOC §21.059.

275 TBOC §§21.101-21.109.

276 TBOC §§21.151-21.171.

277 TBOC §21.172.

278 S.B. 1442, Secs. 27, 28, 32; TBOC §§21.152, 21.153(a), 21.171.

279 S.B. 1442, Sec. 30; TBOC §21.157(c).

280 TBOC §§21.201, 21.218-21.219.

281 TBOC §§21.209-21.217.

282 TBOC §§21.220-21.222.

283 TBOC §§21.223-21.226.

284 TBOC §§21.202-21.208.

existed at that time. The TBCA was also revised in the 2003 Texas Legislature to parallel the Code's provisions. Thus, no substantive change from existing law really exists at this time with respect to preemptive rights.

S.B. 1442 amended Section 21.201 to authorize a for-profit corporation to adopt a procedure for recognizing and directly dealing with a beneficial owner of its shares. A corporation, if it desires, may elect to recognize the beneficial owner as the "shareholder" and to communicate and deal directly with the beneficial owner instead of the record or registered holder. The corporation may recognize the beneficial owner for all purposes or only for certain purposes, such as giving notice of shareholders' meetings or paying dividends. The procedure for recognition is also subject to the corporation's discretion, except that it must include the nominee's filing with the corporation of a statement identifying, and providing other relevant information regarding, the beneficial owner. A beneficial owner's decision to follow the procedure to become recognized as the "shareholder" is also subject to his or her discretion. The provisions are modeled after Section 7.23 of the MBCA.[285]

Subchapter F specifies how the board of directors may reduce the corporation's stated capital or cancel treasury shares.[286]

Subchapter G relates to distributions and share dividends.[287] These provisions continue the same restrictions contained in the TBCA based on solvency and net assets of the corporation with respect to illegal dividends.[288] Liabilities for directors and shareholders for wrongful distributions are also set forth in this subchapter.[289]

Subchapter H contains provisions that supplement the provisions of Title 1, Chapter 6 relating to meetings of shareholders and voting by shareholders.[290] The Subchapter also relates to requirements for proxies and shareholder meeting lists as well as other special corporate provisions relating to shareholder meetings.[291] The provisions reversed the then existing TBCA provisions on cumulative voting. However, the TBCA provisions were amended in the same 2003 Texas Legislature to parallel the Code provisions. As a consequence, the Code provides that cumulative voting by shareholders is not provided unless specifically set forth in the articles of incorporation.[292]

Subchapter H introduces the concept of "fundamental action," which is defined to include (i) an amendment of a certificate of formation; (ii) a voluntary winding up under Chapter 11; (iii) a revocation of a voluntary decision to wind up under Section 11.151; (iv) the cancellation of an event requiring winding up under Section 11.152; or (v) a reinstatement under Section 11.202. Each of these actions in the TBCA have their own separate voting provisions, which created a significant amount of redundancy. The Code collapses these redundant provisions into one section which specifies the vote required to approve a fundamental action.[293]

Subchapter I contains provisions relating to the board of directors, their designation and election, and their terms of office.[294] S.B. 1442 amended Section 21.406(a) to permit a certificate of formation to grant corporate directors different voting rights, without the condition that the directors be elected by separate classes or series of shares. Also, the same section was clarified to provide that any different director voting rights apply to votes not only on board matters, but also on committee matters, unless the certificate of formation provides otherwise.[295] These changes are modeled after provisions of Section 141(d) of the DGCL.

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285 S.B. 1442, Sec. 33.

286 TBOC §§21.251-21.254.

287 TBOC §§21.301-21.315.

288 TBOC §§21.301, 21.303. The key new definition "distribution limit" in Section 21.301 contains all of the primary tests, except the insolvency standard specified in Section 21.303.

289 TBOC §§21.316-21.318.

290 TBOC §§21.351-21.359, 21.363-21.366.

291 TBOC §§21.367-21.372.

292 TBOC §§21.360-21.362.

293 TBOC §21.364.

294 TBOC §§21.401-21.408.

295 S.B. 1442, Sec. 36.

H.B. 1737 clarified both Chapter 21 of the Code and TBCA Art. 2.32 to provide when a director's resignation takes effect and to clarify when a resignation is revocable or irrevocable. Although receipt of the resignation is the general rule for effectiveness, the resignation can also take effect on the occurrence of a future event, including for example, the director's failure to receive a specified vote for reelection as a director. As to revocability, the resignation becomes irrevocable when the resignation takes effect. Prior to taking effect, the resignation is revocable unless the notice of resignation expressly states it is irrevocable.[296] Provisions that are supplemental to Title 1, Chapter 6 govern notices and waivers of meetings of directors.[297] Other provisions authorize the establishment of committees[298] and the election of officers[299] and provide mechanisms for interested directors to obtain approval of contracts or transactions in which they have an interest.[300] The few provisions relating to officers are contained in this Subchapter.

Subchapter J contains the provisions that specify the approval procedures for a "fundamental business transaction," which means a merger, interest exchange, conversion or sale of all or substantially all of the corporation's assets.[301] These provisions supplement the provisions of Title 1, Chapter 10 that contain the basic provisions governing fundamental business transactions. The provisions direct how the board of directors must adopt resolutions approving the fundamental business transaction and the procedure for submission of the transaction for approval by shareholders.[302] One section also cross references to the rights of dissent and appraisal for shareholders contained in Subchapter H of Chapter 10.[303]

Subchapter K contains provisions that supplement the provisions of Title 1, Chapter 11 governing winding up and termination of the corporation. Subchapter K specifies the procedures for approval of (i) a voluntary winding up, (ii) a reinstatement in accordance with Section 11.202, (iii) a cancellation of an event requiring winding up under Section 11.152, or (iv) a revocation of a voluntary decision to wind up in accordance with Section 11.151. The requirements for approval of the board of directors are specified as well as the requirement for shareholder approval.[304]

Subchapter L contains detailed provisions governing derivative proceedings by shareholders.[305] These provisions are drawn directly from the TBCA provisions with no substantive changes.

Subchapter M carries over to the Code the business combination law contained in the TBCA. These provisions regulate the acquisition of shares and mergers with affiliated shareholders that own 20% or more of the outstanding voting shares of public corporations.[306]

Subchapter N contains several special provisions relating to open-end investment companies regulated by the Investment Company Act of 1940.[307]

Subchapter O governs close corporations. These provisions are taken from the TBCA with few changes.[308]

Subchapter P governs judicial proceedings relating to close corporations and again was

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296 C.S.H.B. 1737, Secs. 78, 140; TBOC §21.4091; TBCA Art. 2.32.E.

297 TBOC §§21.411-21.412.

298 TBOC §21.416.

299 TBOC §21.417.

300 TBOC §21.418. Section 21.418 establishes several alternative procedures by which a corporation can validly authorize a contract or transaction in which a director or officer has a conflicting interest or relationship, as described in subsection (a) of that section. S.B. 1442 amended Subsection (b) to more clearly refer to or connect its provisions to the contract or transaction,, as well as the relationship or interest of the director or officer, described in subsection (a) of that section.

301 TBOC §1.002(32).

302 TBOC §§21.451-21.459.

303 TBOC §21.460.

304 TBOC §§21.501-21.504.

305 TBOC §§21.551-21.563.

306 TBOC §§21.601-21.610.

307 TBOC §§21.651-21.655.

308 TBOC §§21.701-21.732.

derived with few changes from the existing TBCA provisions.[309]

Subchapter Q contains miscellaneous provisions relating to the confirmation of shares as personal property and providing for penalties for late filing of certain instruments.[310]

C. Nonprofit Corporations. Chapter 22 is the main chapter that governs nonprofit corporations and was derived entirely from the TNPCA. Although the provisions are substantially reorganized and subdivided into separate sections as compared to the TNPCA provisions, most of the provisions contain no substantive changes from the TNPCA.

Subchapter A includes Section 22.001 which contains most of the definitions applicable to Chapter 22. Section 22.002 contains a restriction on meetings by remote electronic communications system that requires consent of the persons entitled to participate in the meeting, in a manner similar to TNPCA Art. 9.11.A.

Subchapter B contains provisions that supplement the provisions of Title 1, Chapter 2 regarding the purposes and powers of a corporation. Special provisions (i) authorize charitable corporations to be formed to operate as dental health services corporations,[311] (ii) restrict dividends to any nonprofit corporation's members, directors or officers,[312] (iii) authorize the corporation to pay compensation, benefits and distributions in certain circumstances to members, directors or officers and to assist employees or officers (but not a director) by lending them money for certain purposes,[313] and (iv) authorize the formation of a health organization corporation.[314]

Subchapter C contains provisions that supplement the provisions of Title 1, Chapter 3 regarding the procedures for approval of amendments to the certificate of formation[315] and restated certificates of formation.[316]

Subchapter C contains additional provisions relating to the incorporation of certain religious or charitable associations or a church,[317] the requirement for adoption of bylaws[318] and an organizational meeting of the initial directors.[319]

Subchapter D relates to the rights of members and protects them from personal liability for the debts, liabilities or obligations of the corporation.[320] The Subchapter contains provisions that supplement the provisions of Title 1, Chapter 6 relating to meetings of members and voting by members.[321] The Subchapter also requires preparation of a list of voting members as well as other special corporate provisions relating to meetings of members.[322] H.B. 1737 amended the record date requirements to eliminate the need to set a new record date for a meeting of members of a nonprofit corporation if the meeting is adjourned to a date more than 90 days after the record date. The change also reserved the right of the board of directors to set a new record date in its discretion.[323] These changes made the provisions for nonprofit corporations for adjourned meetings more similar to those for for-profit corporations.

Subchapter D introduces the concept of "fundamental action," which is defined to include (i) an amendment of a certificate of formation, (ii) a voluntary winding up under Chapter 11, (iii) a revocation of a voluntary decision to wind up under Section 11.151, (iv) a cancellation of an event requiring winding up under Section 11.512, (v) a reinstatement under Section 11.202, (vi) a distribution plan under Section 22.305, (vii) a plan of merger, conversion or exchange, or (viii) a sale of all or

309 TBOC §§21.751-21.763.

310 TBOC §§21.801-21.802.

311 TBOC §22.052.

312 TBOC §22.053.

313 TBOC §§22.054, 22.055.

314 TBOC §22.056.

315 TBOC §§22.105-22.108.

316 TBOC §22.109.

317 TBOC §22.101.

318 TBOC §22.102.

319 TBOC §22.104.

320 TBOC §22.152.

321 TBOC §§22.153-22.157.

322 TBOC §§22.158-22.163.

323 C.S.H.B. 1737, Sec. 88; TBOC §22.163(c).

substantially all of the assets of the corporation. Each of these actions in the TNPCA have their own separate voting provisions, which created a significant amount of redundancy. The Code collapses these redundant provisions into one section which specifies the vote required to approve a fundamental action.[324]

Subchapter E contains provisions relating to the board of directors, their designation and election, and their terms of office.[325] Provisions that are supplemental to Title 1, Chapter 6 govern notices and waivers of meetings.[326] Other provisions (i) authorize the establishment of committees[327] and the election of officers,[328] (ii) establish general standards for the duties of a director,[329] (iii) prohibit loans to directors,[330] (iv) provide mechanisms for interested directors to obtain approval of contracts or transactions in which they have an interest,[331] and (v) establish director liability for certain distributions of assets.[332] The few provisions relating to officers are contained in this Subchapter.

Subchapter F contains the provisions that specify the approval procedures for a "fundamental business transaction," which means a merger, interest exchange, conversion or sale of all or substantially all of the corporation's assets.[333] These provisions supplement the provisions of Title 1, Chapter 10 that contain the basic provisions regarding fundamental business transactions. The provisions direct (i) how the board of directors must adopt resolutions approving the fundamental business transaction and the procedure for submission of the transaction for approval by members or (ii) how the members must approve the fundamental business transaction if management of the corporation is vested in its members.[334]

Subchapter G contains provisions that supplement provisions of Title 1, Chapter 11 governing winding up and termination of the corporation. Subchapter G specifies the procedures for approval of (i) a voluntary winding up, (ii) a reinstatement in accordance with Section 11.202, (iii) a cancellation of an event requiring winding up under Section 11.152, (iv) a revocation of a voluntary decision to wind up in accordance with Section 11.151, or (v) a distribution plan in accordance with Section 22.305. The requirements for approval by the board of directors or the managing members, as well as the requirement for member approval, are specified.[335]

Subchapter H contains provisions setting forth the corporation's obligations to maintain financial records and to file annual reports.[336] The corporation must make its papers, books and reports available to the public for inspection.[337] Certain types of corporations are exempt from the requirements of this Subchapter.[338] If a required report is not timely filed, a corporation commits a Class B misdemeanor and may forfeit its right to conduct affairs in Texas.[339] This Subchapter also specifies the effect of forfeiture of the right to conduct affairs and the methods for reviving or reinstating such right.[340]

Subchapter I sets forth special provisions for a "church benefits board," which is an organization described by Internal Revenue Code Section 414(e)(3)(A).[341]

D. Special-Purpose Corporations. Chapter 23 applies to special-purpose corporations that are created under this chapter or under a separate statute outside the Code. Subchapter A contains

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324 TBOC §22.164.

325 TBOC §§22.201, 22.203-22.208.

326 TBOC §22.217.

327 TBOC §§22.218-22.219.

328 TBOC §§22.231-22.232.

329 TBOC §§22.221-22.223.

330 TBOC §22.225.

331 TBOC §22.230.

332 TBOC §22.226.

333 TBOC §1.002(32).

334 TBOC §§22.251-22.253, 22.256-22.257.

335 TBOC §§22.301-22.307.

336 TBOC §22.352.

337 TBOC §22.353.

338 TBOC §22.355.

339 TBOC §§22.354, 22.360-22.361.

340 TBOC §§22.362-22.365.

341 TBOC §§22.401-22.409.

general provisions that specify that Title 1 and Chapter 21 of the Code apply to these special-purpose corporations if they are organized for profit but only to the extent not inconsistent with the special statute under which the corporation was formed. On the other hand, if the special-purpose corporation is organized not for profit, then Title 1 and Chapter 22 apply to it to the extent not inconsistent with the special statute. The provisions also authorize the special statute to specifically incorporate the general laws for corporations to supplement the special statute.[342] Subchapter B contains special provisions governing business development corporations.[343] Subchapter C contains special provisions governing lodges.[344]

XI. TITLE 3 – LIMITED LIABILITY COMPANIES

Title 3 has only one chapter, Chapter 101, and applies solely to limited liability companies. The Code uses the term "company agreement" in lieu of the old term "regulations" used in the TLLCA.[345] The new term was intended to emphasize the underlying contractual nature of this governing document for a limited liability company. Nevertheless, having only one member does not make the "company agreement" unenforceable.[346]

The most significant change in Title 3 from the TLLCA was the change in structure of how the provisions are applied. The TLLCA contained numerous provisions that were expressly qualified with the language "unless otherwise provided in the articles of organization or regulations" or similar limitations. In the interest of clarity and economy of language, the Code takes the approach that every provision in Title 3 governing limited liability companies may be waived or modified by the company agreement except as specified in Section 101.054, as discussed below. In the absence of a governing provision in the company agreement, the provisions of Title 3 will apply as a "default" provision.

Subchapter A contains only one section that sets forth certain definitions used in Chapter 101.[347]

Subchapter B contains provisions primarily relating to the company agreement of a limited liability company.[348] Section 101.054 is particularly important because it specifies the particular sections of Chapter 101 and the particular chapters in Title 1 that cannot be waived or modified in the company agreement, except in certain limited circumstances.

H.B. 1737 eliminated a potential area of confusion by clarifying that the provisions of Section 101.151, which require a signed writing as a condition for an enforceable promise to make a contribution to the limited liability company, may not be waived or modified by the company agreement of the limited liability company.[349] Because a company agreement can be oral, the requirement of that section that the contribution commitment must be in writing should not be one of the provisions that can be waived or modified in a company agreement.

Subchapter C contains provisions regarding members of the limited liability company, including the qualification for membership and establishment of classes or groups of members or membership interests.[350] The Subchapter contains provisions governing the ability of a judgment creditor to obtain a charging order to collect money otherwise distributable to a member.[351] H.B. 1737 made a number of amendments to these provisions, which S.B. 1442 further amended to clarify that, although a charging order constitutes a lien on a membership interest in a limited liability company, the lien may not be foreclosed upon under the Code or any other law.[352] The

342 TBOC §23.001.

343 TBOC §§23.051-23.071.

344 TBOC §§23.101-23.110.

345 TBOC §101.001(1). "Company agreement" is defined to be any agreement, written or oral, of the members concerning the affairs or the conduct of the business of a limited liability company.

346 Id.

347 TBOC §101.001.

348 TBOC §§101.051-101.053.

349 C.S.H.B. 1737, Sec. 97; TBOC §101.054(a).

350 TBOC §§101.102-101.104.

351 TBOC §101.112.

352 C.S.H.B. 1737, Sec. 98; S.B. 1442, Sec. 40.

Subchapter also addresses the issuance and assignment of membership interests[353] and the rights and duties of assignees of membership interests before and after becoming a member.[354] S.B. 1442 amended Section 101.106 to clarify that Sections 9.406 and 9.408 of the Texas Business & Commerce Code ("TBCC") do not apply to membership interests in a limited liability company. Sections 9.406 and 9.408 contain limitations on the enforceability of contractual provisions that restrict transfer of payment intangibles and other general intangibles. Because membership interests in a limited liability company that are not represented by certificates and subject to Chapter 8 of the TBCC are considered general intangibles under the TBCC, there may be a concern that those two TBCC sections would impair or negate restrictions on transfer of membership interests that are permitted by Chapter 101 and typically included in a company agreement.[355]

Subchapter D relates to contributions by members, including the consequences of a failure to make a required contribution, and creditors' rights to enforce the obligation to make a contribution.[356]

Subchapter E governs allocations of the company's profits and losses and distributions to members.[357] S.B. 1442 added a new Section 101.208 to clarify that a company agreement of a limited liability company may establish or provide for the establishment of record dates for the purpose of determining members entitled to allocations and distributions by the company.

This provision is modeled after Section 18-606 of the DLLCA.[358] S.B. 1442 also amended Section 101.206 to define "distribution" to make it clear that the section's limitation on distributions does not apply to payments for reasonable compensation for past or present services, or reasonable payments made in the ordinary course of business under a bona fide retirement plan or other benefits program.[359] The new provision is modeled on Section 18-607(a) of the DLLCA.

Subchapter F specifies how the limited liability company can be managed by the managers or the managing members of the company.[360] The Subchapter authorizes the establishment of committees[361] and the designation of agents[362] and specifies how contracts or transactions involving interested governing persons or officers can be validated.[363] S.B. 1442 amended Section 101.255 to clarify that action by the governing authority regarding a contract or transaction with an interested governing person may be taken by unanimous written consent of the governing persons or committee of governing persons, including the consent of the interested governing person.[364]

Subchapter G contains special provisions relating to managers and specifies how the number and qualifications of managers are established and the term of managers.[365] Provisions regarding removal and replacement of managers are also contained in this Subchapter.[366]

Subchapter H contains provisions that govern meetings and voting by the governing authority, members or a committee of the governing authority of the company.[367] Provisions are set forth that are supplemental to Title 1, Chapter 6 governing notices of meetings.[368] Section 101.356 specifies the vote required to approve certain actions. Provisions also authorize the use of proxies[369] and action by less than unanimous written consent.[370] Section

353 TBOC §§101.105, 101.108.

354 TBOC §§101.109-101.111.

355 S.B. 1442, Sec. 39.

356 TBOC §§101.151-101.156.

357 TBOC §§101.201-101.207.

358 S.B. 1442, Sec. 42.

359 S.B. 1442, Sec. 41.

360 TBOC §§101.251-101.252.

361 TBOC §101.253.

362 TBOC §101.254.

363 TBOC §101.255.

364 S.B. 1442, Sec. 44.

365 TBOC §§101.301-101.303.

366 TBOC §§101.304-101.306.

367 TBOC §101.351.

368 TBOC §101.352.

369 TBOC §101.357.

370 TBOC §101.358.

101.359 was added in 2005 and authorizes actions to be taken in less formal manner, including valid consents based on knowing silence.

Subchapter I specifies that the company agreement may expand or restrict the duties and related liabilities of a member, manager or officer of the limited liability company[371] and permits indemnification and advancement or reimbursement of expenses in favor of a member, manager or officer.[372]

Subchapter J contains detailed provisions governing derivative proceedings by members.[373]

Subchapter K contains requirements that are supplemental to the provisions of Title 1, Chapter 3 relating to the records to be maintained by a limited liability company and the rights of a member or an assignee to examine and copy the records of the company.[374] H.B. 1737 restored some of the information required to be maintained in the books and records of a limited liability company, which requirements were erroneously not included in the Code.[375] The new change resulted in the provisions paralleling the source provisions in TLLCA Art. 2.22.

Subchapter L contains provisions that supplement the provisions of Title 1, Chapter 11 governing winding up and termination of a limited liability company. Section 101.552 specifies the vote required to approve (i) a voluntary winding up, (ii) a revocation of a voluntary decision to wind up under Section 11.151, (iii) a cancellation of an event requiring winding up under Section 11.152, or (iv) a reinstatement of a terminated company under Section 11.202. The persons eligible to wind up the limited liability company are specified.[376] H.B. 1737 clarified that the consent of all the members of a limited liability company is required to approve a cancellation of an event requiring winding up resulting from the expiration of the company's period of duration or resulting from an event specified in the governing documents.[377] The requirement of the consent of all rather than a majority of the members is consistent with other provisions of the Code requiring unanimous consent to amend the certificate of formation or company agreement of the limited liability company.

S.B. 1442 added a new Subchapter M to permit limited liability companies to establish series of members, managers, membership interests or assets to which different assets and liabilities may be allocated.[378] The provisions of

Subchapter M are generally modeled after the series LLC provisions in Section 18-215 of the DLLCA. Through appropriate provisions in the company agreement and the certificate of formation, the assets of one series can be isolated from the liabilities attributable to a different series. Subchapter M allows considerably more flexibility in structuring limited liability companies in Texas. The provisions of Subchapter M generally have concepts similar to the DLLCA provisions, but in many instances the wording has been revised to conform to the other provisions of the Code governing limited liability companies, including in particular the provisions relating to winding-up and termination of the series. If a limited liability company's certificate of formation includes a notice that it has or may have series with limitations on liabilities among series, the company agreement establishes or provides for the establishment of one or more series, the assets of each series are segregated and separate records are kept for each series, then (a) the liabilities and obligations incurred or contracted for by, or otherwise applicable to, a particular series will be enforceable only against the assets of that series, and not against the assets of the limited liability company generally or of any other series, and (b) unless otherwise provided in the company agreement, none of the liabilities or obligations incurred or contracted for by, or otherwise applicable to, the limited liability company generally or any other series will be enforceable against the assets of that series.

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371 TBOC §101.401.

372 TBOC §101.402.

373 TBOC §§101.451-101.463.

374 TBOC §§101.501-101.502.

375 C.S.H.B. 1737, Sec. 101; TBOC §101.501(a).

376 TBOC §101.551.

377 C.S.H.B. 1737, Sec. 102; TBOC §101.552(b).

378 S.B. 1442, Sec. 45; TBOC §§101.601-101.621.

XII. TITLE 4 – PARTNERSHIPS

A. General. Title 4 is divided into four Chapters. Chapter 151, the first chapter, contains only three sections that contain general provisions that apply to all types of partnerships. These general provisions include general definitions[379] and specify how a person has knowledge or notice of a fact for purposes of Title 4.[380] S.B. 1442 added Section 151.004 to clarify that a partnership may have elected or appointed officers in accordance with Section 3.103. This amendment made clear that Section 3.103 applies to partnerships, as originally intended by that provision.[381]

B. General Partnerships. Chapter 152 is the main chapter that governs general partnerships and was derived entirely from the TRPA. Although the provisions are substantially reorganized and subdivided into separate sections as compared to the TRPA provisions, most of the provisions contain no substantive changes from the TRPA.

Subchapter A contains general provisions, including Section 152.001, which contains most of the definitions applicable to Chapter 152. Section 152.002 is particularly important because it provides that a partnership agreement generally controls over contrary provisions in chapter 152 subject to certain restrictions on the contents of a partnership agreement. A partnership agreement cannot eliminate certain duties, rights and powers of partners. The section also specifies what provisions of Title 1 can be waived or modified in the partnership agreement, with certain exceptions.

Subchapter B contains provisions that specify what constitutes a partnership[382] and the rules for determining if a partnership is created.[383] Specific authority is also granted for certain professionals to form partnerships.[384] This provision is not intended to limit the ability of other professionals to form general partnerships.

Subchapter C contains provisions relating to the nature and classification of partnership property.[385]

Subchapter D sets forth the rules regarding the relationship between partners and between partners and the partnership. The rights and duties and general standards of conduct for partners are specified.[386] Remedies are also provided for the partnership or other partners against a breaching partner.[387] The partner's rights to access to the books and records and information regarding the partnership is also set forth.[388]

Subchapter E contains provisions relating to the relationship between partners and other persons, including the binding effect of a partner's action on the partnership when dealing with third parties.[389] The rules for liability of the partnership for the conduct of a partner[390] and the nature of the partner's liability are contained in this Subchapter.[391] Remedies are provided in favor of creditors of the partnership.[392]

Subchapter F contains the provisions governing the transfer of partnership interests, the effects of the transfer, the rights of the transferee and the effect of death or divorce on a partnership interest.[393]

Subchapter G specifies the events of withdrawal that cause a person to cease to be a partner and the effects of an event of withdrawal, including the liability of the withdrawing partner.[394]

Subchapter H contains provisions regarding the redemption of a withdrawing partner's or transferee's interest in the partnership. Provisions establishing the payment of the

379 TBOC §151.001.

380 TBOC §§151.002-151.003.

381 S.B. 1442, Sec. 46.

382 TBOC §152.051.

383 TBOC §152.052.

384 TBOC §152.055.

385 TBOC §§152.101-152.102.

386 TBOC §§152.203-152.204.

387 TBOC §152.211.

388 TBOC §152.212.

389 TBOC §§152.301-152.302.

390 TBOC §152.303.

391 TBOC §152.304.

392 TBOC §§152.305-152.306.

393 TBOC §§152.401-152.404, 152.406.

394 TBOC §§152.501-152.506.

redemption price and other remedies relating to the redemption are contained in this Subchapter.[395]

Subchapter I contains provisions that supplement the provisions of Title 1, Chapter 11 regarding winding up and termination of a partnership. This Subchapter specifies what persons are eligible to manage, and their rights and duties in respect of, the winding up of the partnership's business.[396] Disposition of the partnership's assets and the settlement of accounts are also covered.[397] The partnership is also authorized to continue for a definite term or particular undertaking in certain circumstances.[398]

Subchapter J contains supplemental provisions regarding domestic limited liability partnerships. This Subchapter contains a limitation on liability of the partner in the limited liability partnership,[399] but requires filing an application to register the limited liability partnership with the Texas Secretary of State.[400] Insurance and financial responsibility provisions are included in this Subchapter.[401]

Subchapter K governs foreign limited liability partnerships. The provisions require a filing of an application for registration of the foreign limited liability partnership with the Texas Secretary of State.[402] Provisions regarding the withdrawal and renewal of registration are also contained in this Subchapter.[403] H.B. 1737 also clarified that a foreign limited liability partnership may be formed in a jurisdiction other than a state.[404] The prior language of the Code appeared to limit foreign limited liability partnerships to those formed in states of the United States.

C. Limited Partnerships. Chapter 153 is the main chapter that governs limited partnerships and was derived entirely from the TRLPA. Although the provisions are substantially reorganized and subdivided into separate sections as compared to the TRLPA provisions, most of the provisions contain no substantive changes from the TRLPA.

Subchapter A contains general provisions relating to limited partnerships. Section 153.003 clarifies that the provisions of Chapter 152 governing general partnerships also apply to limited partnerships, except that the powers and duties of a limited partner are not governed by Chapter 152 in any manner inconsistent with the nature and role of a limited partner as contemplated by Chapter 153.[405] Section 153.004 is a particularly important provision that clarifies what provisions of Title 1 can be waived or modified in the partnership agreement of the limited partnership.

Subchapter B contains provisions that supplement the provisions of Title 1, Chapter 3 regarding the procedures for approval of amendments to the certificate of formation[406] and of restated certificates of formation.[407] The Subchapter also specifies the events that require a certificate of formation to be amended within 30 days after the event.[408]

Subchapter C contains provisions relating to the admission, liability and rights of limited partners, including actions a limited partner can take without being considered to be general partners.[409] It also provides protection for persons who are erroneously believed to be general partners or limited partners in the limited partnership.[410] Provisions regarding withdrawal of limited partners and distributions on withdrawal are set forth.[411]

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395 TBOC §§152.601-152.612.

396 TBOC §§152.702-152.705.

397 TBOC §§152.706-152.707

398 TBOC §152.709.

399 TBOC §152.801.

400 TBOC §152.802.

401 TBOC §152.804.

402 TBOC §152.905.

403 TBOC §§152.906-152.908.

404 C.S.H.B. 1737, Secs. 113, 114; TBOC §§152.901(b), 152.902.

405 The term "other limited partnership provisions" in TBOC §153.003 is defined in Section 153.001 to mean the provisions of Title 1 and Chapters 151 and 154 to the extent applicable to limited partnerships.

406 TBOC §§153.051-153.052.

407 TBOC §153.053.

408 TBOC §153.051.

409 TBOC §§153.101-153.102.

410 TBOC §§153.106-153.108.

411 TBOC §§153.110-153.111.

Subchapter D contains provisions relating to general partners, including admission of additional general partners, the powers and liabilities of general partners, and the powers and liabilities of persons who are both general partners and limited partners.[412] A number of sections in this Subchapter deal with the withdrawal of a general partner and its effects, including the liability of a general partner for debts and the conversion of the general partner's partnership interest after withdrawal.[413] Wrongful withdrawal of a general partner and the resulting liability are covered by several sections.[414]

Subchapter E relates to the contributions of a partner to a limited partnership and the enforceability of promises to make contributions.[415] This Subchapter also relates to allocation of profits and losses and the rights to and sharing of distributions by the limited partnership.[416] In addition, certain limitations on distributions are imposed.[417] S.B. 1442 amended Section 153.210 to clarify that a "distribution" by a limited partnership does not include payments for reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program.[418] This provision is modeled after Section 17-607(a) of the Delaware Revised Uniform Limited Partnership Act.

Subchapter F governs assignments of partnership interests and specifies the rights and liabilities of assignors and assignees of partnership interests.[419] The Subchapter also contains provisions governing the ability of a judgment creditor to obtain a charging order to collect money otherwise distributable to a partner.[420] H.B. 1737 made a number of amendments to the charging order provisions, which Senate Bill 1447 further clarified to provide that, although a charging order constitutes a lien on a partnership interest in a limited partnership, the lien may not be foreclosed upon under the Code or any other law.[421]

Subchapter G contains provisions relating to reports that have to be filed and powers of the Secretary of State with respect to the failure of a partnership to file reports, including the power to forfeit the limited partnership's right to transact business in the state.[422] Other provisions govern the revival of the right to transact business and empower the Secretary of State to cancel or reinstate a certificate of formation of the limited partnership in certain circumstances.[423]

Subchapter H contains provisions relating to a limited partnership that applies to become a limited liability partnership.[424] This Subchapter requires the limited partnership to comply with Subchapter J of Chapter 152 in this regard.[425]

Subchapter I contains provisions relating to derivative actions brought by a limited partner on behalf of the limited partnership to recover a claim in the limited partnership's favor.[426]

Subchapter J originally contained provisions relating to the certificate of termination of the limited partnership upon the completion of the winding up of the partnership's business.[427] Most of Subchapter J was repealed by H.B. 1737 because it contained provisions that were largely duplicative of the provisions of Chapter 11 and therefore unnecessary.[428] The only provision that was not redundant of existing Chapter 11 provisions was moved to a new Section 153.505, which now specifies what approval by the former partners in

412 TBOC §§153.151-153.153.

413 TBOC §§153.155, 153.158, 153.161.

414 TBOC §§153.157, 153.162.

415 TBOC §§153.201-153.205.

416 TBOC §§153.206-153.209.

417 TBOC §153.210.

418 S.B. 1442, Sec. 52.

419 TBOC §§153.251-153.255.

420 TBOC §§153.256-153.257.

421 C.S.H.B. 1787, Sec. 125; S.B. 1442, Sec. 53.

422 TBOC §§153.301-153.309.

423 TBOC §§153.310-153.312.

424 TBOC §§153.351-153.352.

425 TBOC §153.353.

426 TBOC §§153.401-153.405.

427 TBOC §§153.451-153.452.

428 C.S.H.B. 1737, Sec. 144(3)

a terminated domestic limited partnership is needed to reinstate a limited partnership.[429]

Subchapter K contains provisions that supplement the provisions of Title 1, Chapter 11 governing winding up and termination of the limited partnership. Section 153.501 is significant in that it allows a limited partnership to continue and cancel an event requiring winding up in certain circumstances. Additional winding up procedures and powers of the persons conducting the winding up are specified in this Subchapter.[430] The Subchapter also specifies how the assets of a limited partnership must be disposed of.[431]

Subchapter L contains miscellaneous provisions requiring supplemental books and records to be maintained by the limited partnership[432] and specifies when a partner or an assignee of a partnership interest may examine and copy these records.[433] The Subchapter also specifies how certain documents to be filed with the Texas Secretary of State can be executed.[434]

H.B. 1737 revised the Code to supply rules for all different types of filing instruments, including certificates of conversion or exchange. The general default rule requires the signature of at least one general partner on the filing instrument or certificate. A number of special execution rules remain in the provisions of the Code with respect to certain types of filing instruments and certificates.[435] Another provision gives a remedy to an adversely effected person to obtain a judicial order to direct the execution or filing of a certificate or the execution of a partnership agreement in certain circumstances.[436]

D. Provisions Applicable to Both General and Limited Partners. Chapter 154 applies to both general and limited partnerships.

Subchapter A specifies that a partner's partnership interest is personal property and can be community property under applicable law,[437] and that a partner does not have a direct interest in partnership property.[438]

Subchapter B permits a partnership agreement to establish classes or groups of partners.[439] Provisions authorize a partnership agreement to grant certain rights with respect to partner votes[440] and require prompt notice to non-consenting partners of the taking of an action under a partnership agreement without a meeting through the consent of less than all the partners.[441]

Subchapter C authorizes partners to lend money and transact business with the partnership unless prohibited by the partnership agreement[442] and authorizes distributions in kind of partnership property.[443] Another provision specifies that a withdrawal or addition of a partner does not affect the relationship between a partnership and its creditors.[444]

XIII. TITLE 5 – REAL ESTATE INVESTMENT TRUSTS

Title 5 has only one chapter, Chapter 200. Subchapter A contains the general

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429 C.S.H.B. 1737, Sec. 128; TBOC §153.505.

430 TBOC §§153.502-153.503.

431 TBOC §153.504.

432 TBOC §153.551.

433 TBOC §153.552.

434 TBOC §153.553.

435 C.S.H.B. 1737, Sec 131; TBOC §153.533(a), (a-1).

436 TBOC §153.554.

437 TBOC §154.001. S.B. 1442 amended Sec. 154.001 to clarify that Sections 9.406 and 9.408 of the TBCC do not apply to partnership interests in a partnership. Those provisions contain limitations on the enforceability of contractual provisions that restrict transfer of payment intangibles and other general intangibles. Because interests in a partnership that are not represented by certificates and subject to Chapter 8 of the TBCC are considered general intangibles under the TBCC, there was a concern that those provisions would impair or negate restrictions on transfer of partnership interests that are permitted by Chapters 152 and 153 and typically included in partnership agreements. S.B. 1442, Sec. 57.

438 TBOC §154.002.

439 TBOC §154.101.

440 TBOC §154.102.

441 TBOC §154.103.

442 TBOC §154.201.

443 TBOC §154.203.

444 TBOC §154.202.

provisions, including the all important definition of what constitutes a real estate investment trust.[445] Subchapter A contains supplemental provisions regarding the powers of a real estate investment trust in addition to those provisions contained in Title 1, Chapter 2.[446] These general provisions also include provisions governing ultra vires acts[447] and the requirements for signing filing instruments by officers.[448] Subchapter A incorporates the provisions of Title 1 and Chapters 20 and 21 governing for-profit corporations unless there is a conflict with any provision in Chapter 200.[449] Section 200.002 specifies that an unincorporated trust that does not meet the requirements of Chapter 200 is an unincorporated association.

Subchapter B contains provisions that supplement the provisions of Title 1, Chapter 3 regarding the certificate of formation[450] and the procedures to adopt amendments to the certificate of formation[451] and restated certificates of formation.[452] Section 200.051 clarifies that a "*declaration of trust*" is the same as the certificate of formation of a real estate investment trust. Subchapter B contains additional provisions relating to the formation of the trust, including the requirement to adopt bylaws[453] and to have an organizational meeting of the initial trust managers.[454]

Subchapter C covers the issuance of shares, classes of shares, the amount, value and sufficiency of consideration for issuance of shares, subscriptions for shares and required records that are in addition to those required under Title 1, Chapter 3.[455]

Subchapter D relates to the rights of shareholders and restrictions on transfers of shares. Provisions regarding the liability of shareholders for trust obligations are also contained in this Subchapter.[456]

Subchapter E relates to distributions and share dividends. The provisions continue the same restrictions contained in the TREITA based on solvency and surplus of the corporation with respect to illegal distributions.[457]

Subchapter F contains provisions that supplement the provisions of Title 1, Chapter 6 relating to meetings of shareholders and voting by shareholders. The Subchapter specifies the votes of shareholders needed to elect trust managers[458] or to approve any other matters.[459] Section 200.261 introduces the concept of "fundamental action" which is defined to include (i) an amendment of a certificate of formation; (ii) a voluntary winding up under Chapter 11; (iii) a revocation of a voluntary decision to wind up under Section 11.151; (iv) a cancellation of an event requiring winding up under Section 11.152; or (v) a reinstatement under Section 11.202. Each of these actions in the TREITA have their own separate voting provisions, which created a significant amount of redundancy. The Code collapses these redundant provisions into one section which specifies the vote required to approve a fundamental action.[460] The Subchapter also relates to requirements for proxies[461] and contains supplemental provisions relating to record dates.[462]

Subchapter G contains provisions relating to the trust managers, including their number, designation, election, compensation and terms of office.[463] Provisions that supplement Title 1, Chapter 6 govern notices and quorums for meetings of trust managers.[464] Other provisions

445 TBOC §200.001.

446 TBOC §200.005.

447 TBOC §200.004.

448 TBOC §200.006.

449 TBOC §200.002.

450 TBOC §200.052.

451 TBOC §§200.053-200.056.

452 TBOC §200.057.

453 TBOC §200.058.

454 TBOC §200.060.

455 TBOC §§200.101-200.113.

456 TBOC §§200.151-200.164.

457 TBOC §§200.201-200.211.

458 TBOC §§200.258-200.259.

459 TBOC §200.260.

460 TBOC §200.261.

461 TBOC §§200.264-200.268.

462 TBOC §§200.255-200.265.

463 TBOC §§200.302-200.307.

464 TBOC §§200.309-200.310.

authorize the establishment of committees[465] and the election of officers[466] and provide mechanisms for interested trust managers to obtain approval of contracts or transactions in which they have an interest.[467] The few provisions related to officers are also contained in this Subchapter. S.B. 1442 amended Section 200.317 to clarify that trust manager action regarding a contract or transaction with an interested trust manager may be taken by a unanimous written consent of trust managers or of committee members, including the consent of the interested trust manager.[468]

Subchapter H has only one section that provides the discretion of the trust managers and officers of the trust to invest the trust estate unless contrary to this Chapter or any federal income tax law governing real estate investment trusts.[469]

Subchapter I contains the provisions that specify the approval procedures for a "fundamental business transaction," which means a merger, interest exchange, conversion or sale of all or substantially all of the real estate investment trust's assets.[470] These provisions supplement the provisions of Title 1, Chapter 10 that contain the basic provisions governing fundamental business transactions. The provisions direct how the trust managers must adopt resolutions approving the fundamental business transaction and the procedure for submission of the transaction for approval by shareholders.[471] One section also cross references to the rights of dissent and appraisal for shareholders contained in Subchapter I of Chapter 10.[472]

Subchapter J contains provisions that supplement the provisions of Title 1, Chapter 11 governing winding up and termination of the real estate investment trust. Sections 200.451 and 200.452 refer to Section 200.261 for the vote required for approval by the shareholders of (i) a voluntary winding up, (ii) a reinstatement in accordance with Section 11.202, (iii) a cancellation of an event requiring winding up under Section 11.152, or (iv) a revocation of a voluntary decision to wind up in accordance with Section 11.151. The trust managers are required to manage the winding up of the real estate investment trust.[473]

Subchapter K contains miscellaneous provisions governing the examination of records by existing shareholders,[474] joinder of shareholders in disposition of assets[475] and various tax law requirements in order to qualify as a real estate investment trust under the Internal Revenue Code and applicable regulations.[476]

XIV.TITLE 6 – ASSOCIATIONS

A. General Provisions. Title 6 contains only two chapters. Chapter 251 governs cooperative associations. Chapter 252 governs unincorporated nonprofit associations.

B. Cooperative Associations. Subchapter A contains general provisions including the definitions that are applicable to Chapter 251.[477] In addition, Subchapter A incorporates the provisions of Title 1 and Chapters 20 and 22 governing nonprofit corporations, unless there is a conflict with any provision in Chapter 251.[478]

Significantly, Section 251.003 specifies that Chapter 251 does not apply to a corporation or association organized on a cooperative basis under another statute of the State of Texas, other than Chapter 251, unless that other statute specifically states that Chapter 251 does apply.

Accordingly, there are many types of cooperative associations that are formed and do business in Texas that are not governed by this Chapter 251. Nevertheless, even though not subject to Chapter 251, if they are formed as

465 TBOC §200.311.

466 TBOC §200.316.

467 TBOC §200.317.

468 S.B. 1442, Sec. 58.

469 TBOC §200.351.

470 TBOC §1.002(32).

471 TBOC §§200.402-200.409.

472 TBOC §200.410.

473 TBOC §200.453.

474 TBOC §200.501.

475 TBOC §200.502.

476 TBOC §200.503.

477 TBOC §251.001.

478 TBOC §251.002.

corporations, they may be subject to the nonprofit corporation provisions of Chapter 22 by virtue of Chapter 23's provisions governing special-purpose corporations formed under statutes outside the Code.[479]

Subchapter B contains provisions that supplement the provisions of Title 1, Chapter 3 regarding the procedures for approval of amendments to the certificate of formation[480] and restated certificates of formation.[481] Subchapter B contains additional provisions requiring the adoption of bylaws[482] and an organizational meeting of the association's directors.[483]

Subchapter C contains provisions relating to the directors and officers of the cooperative association[484] and authorizing the certificate of formation or bylaws of the association to provide for a member referendum on any action undertaken by the board of directors.[485]

Subchapter D contains provisions relating to the eligibility, admission and expulsion of members of the association.[486] This Subchapter grants rights to a subscriber and limits the liability of a member or subscriber of an association.[487]

Subchapter E authorizes the issuance of certificates representing membership or invested capital[488] and contains restrictions and procedures for transfer of membership and investor certificates.[489] The recall of certificates is also authorized.[490]

Subchapter F contains provisions that supplement the provisions of Title 1, Chapter 6 governing meetings of members of an association,[491] including notices,[492] voting by mail or by delegates[493] and the voting rights of a member or group member.[494] A member cannot vote via proxy.[495]

Subchapter G contains limits on return on capital[496] and provisions with respect to allocation and distribution of net savings.[497]

Subchapter H contains provisions that relate to the recordkeeping of the cooperative association,[498] reports to members[499] and an annual report of financial condition.[500] The consequences of a failure to report are also specified.[501]

Subchapter I contains provisions that supplement the provisions of Title 1, Chapter 11 and Sections 22.301-22.303 regarding the winding up and termination of a cooperative association.[502] Special provisions govern the distribution of assets[503] and a suit for involuntary termination of a cooperative association.[504]

Subchapter J contains miscellaneous provisions exempting the cooperative association from Texas franchise taxes and license fees except as otherwise provided in the Tax Code,[505] and prohibits the use of the name "cooperative" by entities not operating on a cooperative basis.[506]

C. Unincorporated Non-profit Associations.

Chapter 252 contains almost verbatim the existing provisions of the TUUNAA. Very few

479 TBOC §§23.001-23.003.
480 TBOC §251.052.
481 TBOC §251.054.
482 TBOC §251.053.
483 TBOC §251.051.
484 TBOC §§251.101-251.103.
485 TBOC §251.104.
486 TBOC §§251.151-251.152.
487 TBOC §§251.153-251.154.
488 TBOC §251.201.
489 TBOC §251.202.
490 TBOC §251.203.
491 TBOC §§251.251-251.257.
492 TBOC §251.252.
493 TBOC §§251.256-251.257.
494 TBOC §251.254.
495 TBOC §251.255.
496 TBOC §251.301.
497 TBOC §251.302.
498 TBOC §251.351.
499 TBOC §251.352.
500 TBOC §251.353.
501 TBOC §251.354.
502 TBOC §§251.401-251.402.
503 TBOC §251.403.
504 TBOC §251.404.
505 TBOC §251.451.
506 TBOC §251.452.

changes have been made from the existing statute. However, Section 252.017 specifies that Chapters 1 and 4 and, if a nonprofit association designates an agent for service of process, Subchapter E of Chapter 5 apply to a nonprofit association. The same section specifies that no other provisions of a Code apply to a nonprofit association.

XV. TITLE 7 – PROFESSIONAL ENTITIES.

A. General Provisions. Title 7 is divided into four chapters. Chapter 301 contains general provisions relating to all professional limited liability companies, professional associations and professional corporations. It should be noted that Section 301.001 specifically exempts partnerships, including limited liability partnerships, from the provisions of Title 7.[507] Thus, partnerships can provide professional services assuming the regulatory law governing the professional service permits practice of that profession in a partnership entity.

Section 301.003 contains definitions that apply generally throughout Title 7, including definitions of professional corporation, professional association, professional limited liability company and professional service.[508] Particular note should be taken of the definition of professional association, which limits the types of professions that can be practiced in that form of entity.[509] H.B. 1737 clarified the provisions of Chapter 301 to incorporate the common law doctrine that the practice of medicine cannot be performed in a professional corporation.[510] The Code's provisions were not intended to overturn that common law rule.

Chapter 301 specifies what kinds of owners each type of professional entity can have, as well as the duties and powers of the owners and managerial officials.[511] Transfers of ownership interests are restricted by the Chapter to professional entities and/or professional individuals, depending on the type of entity.[512] The liability of the professional entity for the negligence, incompetence or malfeasance committed by its owners, managerial officials, employees or agents is specified in this chapter.[513] The chapter also permits the joint practice of certain professionals in the same professional entity.[514]

B. Professional Associations. Chapter 302 applies only to professional associations and is derived from the TPAA. The Chapter incorporates the provisions of Chapters 20 and 21 governing for-profit corporations, unless there is a conflict with any provision in Title 7.[515] Special provisions specify the duration of a professional association and supplement the procedures for amendment of the certificate of formation of the association.[516] Other supplemental provisions relate to (i) the voting rights of members,[517] (ii) the eligibility of officers and governing persons,[518] (iii) the adoption of bylaws,[519] (iv) the employment of agents and employees,[520] (v) the requirement for an annual statement,[521] and (vi) the procedures for approval of a voluntary winding up and termination of the association.[522]

C. Professional Corporations. Chapter 303 contains special provisions applying only to professional corporations and is derived solely from the TPCA. The Chapter incorporates the provisions of Chapters 20 and 21 governing for-profit corporations, unless there is a conflict with any provision in Title 7.[523] Provisions in this Chapter require restrictions on transfers of

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507 TBOC §300.001(c).

508 TBOC §301.003(2), (3), (6), (8).

509 TBOC §301.003(2).

510 C.S.H.B. 1737, Sec. 135; TBOC §301.003(3).

511 TBOC §§301.004, 301.006, 301.007.

512 TBOC §301.008.

513 TBOC §301.010.

514 TBOC §301.012.

515 TBOC §302.001.

516 TBOC §§302.002, 302.003.

517 TBOC §302.006.

518 TBOC §302.008.

519 TBOC §302.004.

520 TBOC §302.009.

521 TBOC §302.012.

522 TBOC §302.013.

523 TBOC §303.001.

shares to be noted on certificates and govern the redemption of shares of a shareholder.[524] Chapter 303 also contains provisions that supplement Title 1, Chapter 11 regarding the winding up and termination of the professional corporation.[525]

D. Professional Limited Liability Companies. Chapter 304 contains only one section and applies solely to professional limited liability companies. That section incorporates the provisions of Title 3 governing limited liability companies generally, unless there is a conflict with any provision in Title 7.[526]

XVI. FUNDAMENTAL BUSINESS TRANSACTIONS

A. Mergers. The Code does not have the concept of "consolidation" of entities. That concept is subsumed within the definition of "*merger*".[527] That definition includes the combination of one or more domestic entities with one or more domestic entities or non-code organizations resulting in the creation of one or more new domestic entities or non-code organizations.

A domestic entity may effect a merger if each domestic entity that is a party to the merger acts on and approves the plan of merger in the manner prescribed in the Code for the approval of mergers by the domestic entity. The notice of the meeting at which the merger is approved must include an additional notice if the domestic entity is subject to dissenter's rights.[528] If one or more non-Code organizations is a party to the merger or is to be created by the plan of merger, the merger must be permitted by the laws of the state or country under whose law each non-Code organization is incorporated or organized, or the governing documents of each non-Code organization if the documents are not inconsistent with the law under which a non-Code organization is incorporated or organized.

In addition, each non-Code organization that is a party to the merger must comply with the applicable laws under which it is incorporated or organized and the governing documents of the non-Code organization. A domestic entity that is a party to the merger may not merge if an owner or member of that entity will, as a result of the merger, become personally liable, without that owner's or member's consent, for a liability or other obligation of any other person.[529]

The plan of merger must include, among other things, the manner and basis of converting any of the ownership or membership interests of each organization that is a party to the merger into: (A) ownership interests, membership interests, obligations, rights to purchase securities, or other securities of one or more of the surviving or new organizations; (B) cash; (C) other property, including ownership interests, membership interests, obligations, rights to purchase securities, or other securities of any other person or entity; or (D) any combination of the foregoing items. In addition, the plan of merger must include: (1) the certificate of formation of each new domestic filing entity and the governing documents of each new domestic nonfiling entity to be created by the merger, and (2) the governing documents of each non-Code organization that is to survive the merger or to be created by the plan of merger and that is not organized under the laws of any state or the United States or required to file its certificate of formation or similar document under which the entity is organized with the appropriate governmental authority.[530] A plan of merger may treat differently the owners or members in the same class or series.[531]

If more than one organization is to survive or to be created by the plan of merger, the plan of merger must include: (1) the manner and basis of allocating and vesting the property of each organization that is a party to the merger among one or more of the surviving or new organizations; (2) the name of each surviving or new organization that is primarily obligated for the payment of the fair value of an ownership or

524 TBOC §§303.003, 303.004.

525 TBOC §§303.005, 303.006.

526 TBOC §304.001.

527 TBOC §1.002(55).

528 TBOC §§10.001(c), 10.355.

529 TBOC §10.001.

530 TBOC §10.002(a).

531 TBOC §10.002(c).

membership interest of an owner or member of a domestic entity subject to dissenter's rights that is a party to the merger and who complies with the requirements for dissent and appraisal under the Code; and (3) the manner and basis of allocating each liability and obligation of each organization that is a party to the merger, or adequate provisions for the payment and discharge of each liability and obligation, among one or more of the surviving or new organizations.[532] Upon effectiveness of the merger, all rights, title and interest to all real estate and other property owned by each organization that is a party to the merger is allocated to and vested, subject to any existing liens or other encumbrances on the property, in one or more of the surviving or new organizations as provided in the plan of merger without reversion or impairment, any further act or deed or any transfer or assignment having occurred. In addition, all of the liabilities and obligations of each organization that is a party to the merger are allocated to one or more of the surviving or new organizations in the manner provided by the plan of merger, and that organization is the primary obligor for the liability or obligation and, except as otherwise provided by the plan of merger or by law or contract, no other party to the merger, other than a surviving domestic entity or non-Code organization liable or otherwise obligated at the time of the merger, and no other new domestic entity or non-Code organization created under the plan of merger is liable for the debt or other obligation. The surviving or new organization named in the plan of merger as primarily liable to pay the fair value of an ownership or membership interest to a dissenting owner or member is the primary obligor for that payment and all other surviving or new organizations are secondarily liable for that payment.[533] Other effects of a merger are specified in Section 10.008(a) of the Code.

If the plan of merger does not allocate a property, liability or obligation to any party of the merger, the unallocated property is owned in undivided interest by, and the liability or obligation is the joint and several liability and obligation of, each of the surviving and new organizations, pro rata to the total number of surviving and new organizations resulting from the merger.[534] If the surviving organization in a merger is not a domestic entity, the organization must register to transact business in Texas if the entity is required to register for the purpose by another provision of the Code.[535] In addition, such surviving organization is considered to have appointed the Texas Secretary of State as its agent for service of process in a proceeding to enforce any obligation of a domestic entity that is a party to the merger and to have agreed to promptly pay to the dissenting owners or members of each domestic entity that is a party to the merger who have the right of dissent and appraisal under the Code, any amount to which they are entitled under the Code.[536]

The filing of a certificate of merger in the state of Texas is required if any domestic entity that is a party to the merger is a filing entity or any domestic entity to be created under the plan of merger is a filing entity.[537]

The certificate of merger that must be filed in the state of Texas must contain a copy of the plan of merger or alternative required statements. The alternative required statements include for a merger, among other things, the amendments or changes to the certificate of formation of each filing entity that is a party to the merger or, if no amendments are desired to be effected by the merger, a statement to that effect. In addition, the certificate of merger, if the plan of merger is not attached, must state that a signed plan of merger is on file with the principal place of business of each surviving, acquiring or new domestic entity or non-Code organization, and the address of each principal place of business and that a copy of the plan of merger will be on written request furnished without cost to any owner or member of any domestic entity that is a party to or created by the plan of merger. If the merger has multiple surviving domestic entities or non-Code

532 TBOC §10.003.

533 TBOC §10.008(a).

534 TBOC §10.008(b).

535 TBOC §10.008(d).

536 TBOC §10.008(c).

537 TBOC §10.151(a).

organizations, the plan of merger must also be provided to any creditor or obligee of the parties to the merger at the time of the merger if a liability or obligation is then outstanding. If no approval of the owners or members of any domestic entity that was a party to the merger is required by the Code, a statement to that effect must be included in the certificate of merger in any event. Finally, the certificate of merger must state that the plan of merger has been approved as required by the laws of the jurisdiction of formation and the governing documents of each organization that is a party to the merger.[538]

The Code expands the provisions governing the formation of holding companies without requiring the vote of owners or members from for-profit corporations to other types of entities, except partnerships.[539] Restructuring opportunities are available to the governing authority without the hassle and expense of solicitation of and approval by owners or members.

The so-called "*short-form*" merger provision in the Code applies to all types of entities, except that it does not apply if a subsidiary organization that is a party to the merger is a partnership.[540] Under the prior statutes, that type of merger was restricted to limited liability companies and business corporations. Thus, a parent partnership may merge with one or more non-partnership subsidiary entities in which it owns at least 90% of the voting interest without approval of the subsidiaries' owners.

One or more domestic nonprofit corporations and non-Code organizations may merge into one or more foreign nonprofit entities that continue as the surviving entity or entities. However, a domestic nonprofit corporation may not merge into another entity if the domestic nonprofit corporation would, because of the merger, lose or impair its charitable status. In addition, a domestic nonprofit corporation may not merge with a foreign for-profit entity if the domestic nonprofit corporation does not continue as the surviving entity. On the other hand, one or more domestic or foreign for-profit entities or non-Code organizations may merge into one or more domestic nonprofit corporations that continue as the surviving entity or entities.[541]

The partnership agreement of each domestic partnership that is a party to the merger must contain provisions that authorize the merger provided for in the plan of merger adopted by the partnership. Each domestic partnership that is a party to the merger must approve the plan of merger in the manner prescribed in its partnership agreement. A partner in a domestic partnership that is a party to the merger but does not survive is treated as a partner who withdrew from the nonsurviving domestic partnership as of the effective date of the merger. The Code contains other special provisions governing mergers of a domestic partnership.[542]

B. Conversions. A domestic entity may convert into a different type of domestic entity or a non-Code organization by adopting a plan of conversion. [543] Certain domestic entities are subject to dissenters' rights and must provide additional content in its notices to owners in connection with the approval of the plan of conversion.[544] A conversion may not take effect if the conversion is prohibited by or inconsistent with the laws of the converted entity's jurisdiction of formation and the formation, incorporation or organization of the converted entity under the plan of conversion must be effected in compliance with those laws pursuant to the plan of conversion.[545] A domestic entity may not convert if an owner or member of the domestic entity, as a result of the conversion, becomes personally liable, without the consent of the owner or member, for a liability or other obligation of the converted entity.[546]

538 TBOC §10.151.

539 TBOC §10.005.

540 TBOC §10.006.

541 TBOC §10.010.

542 TBOC §10.009.

543 TBOC §10.101(a).

544 TBOC §§10.101(c) and 10.355.

545 TBOC §10.101(d).

546 TBOC §10.101(f).

A non-Code organization may convert into a domestic entity by adopting a plan of conversion and taking any action that may be required for a conversion under the law or the organization's jurisdiction of formation and the organization's governing documents.[547] The conversion must be permitted by the laws under which the non-Code organization is incorporated or organized or by its governing documents, which may not be inconsistent with the laws of the jurisdiction in which the non-Code organization is incorporated or organized.[548]

S.B. 1442 added to the Code provisions that authorize "conversion and continuance" transactions.[549] By a "conversion and continuance" transaction, an entity may be deemed formed and domesticated both in Texas and in a foreign country or jurisdiction outside of the United States.[550] The concepts in these new provisions are based on similar concepts contained in the entity laws of the State of Delaware. Non-United States entities sometimes use these kinds of provisions in Delaware in order to provide a means to do business in the United States while avoiding adverse foreign tax ramifications.

A new Section 10.1025 authorizes a converting entity to elect to continue its existence in its current organizational form and jurisdiction of formation in connection with a conversion under Chapter 10 of the Code. This election is only available to a domestic entity of one organizational form that is converting into a non-United States entity of the same organizational form or to a non-United States entity of one organizational form converting into a domestic entity of the same organizational form. The election must be adopted and approved as part of the plan of conversion for the converting entity and permitted by, or not prohibited by or inconsistent with, the laws of the applicable non-United States jurisdiction. Because the converting entity continues to exist both in the non-United States jurisdiction and in Texas, Chapter 9 of the Code, relating to registration of foreign filing entities to do business in Texas, would not apply to the entity after its conversion and continuance.

The plan of conversion must include, among other things, the manner and basis of converting the ownership or membership interests of the converting entity. It also must include any certificate of formation required to be filed under the Code if the converted entity is a filing entity.[551] Upon the effectiveness of the conversion, the converting entity continues to exist without interruption in the organizational form of the converted entity rather than in the organizational form of the converting entity, and all rights, title and interest to all property owned by the converting entity continues to be owned, subject to any existing liens or other encumbrances on the property, by the converted entity in the new organizational form without (i) reversion or impairment; (ii) further act or deed; or (iii) any transfer or assignment having occurred. All liabilities and obligations of the converting entity continue to be liabilities and obligations of the converted entity in the new organizational form without impairment or diminution because of the conversion. If the converted entity is a non-Code organization, the converted entity is considered to have appointed the secretary of state as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting owners or members of the converting domestic entity and agree that the converted entity will promptly pay the dissenting owners or members of the converting domestic entity the amount, if any, to which they are entitled under the Code.[552]

Because a conversion of ownership or membership interests is not required in a

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547 TBOC §10.102(a) and (b).

548 TBOC §10.102(e).

549 S.B. 1442, Secs. 15-18; TBOC §§10.1025, 10.103(a), 10.109, 10.154(c).

550 A new Section 10.109 was added by S.B. 1442 to specify the effects of a conversion and continuance transaction, which are that the converting entity continues to exist both in its current organizational form and jurisdiction of formation and in the same organizational form in the new jurisdiction of formation, as a single entity subject to the laws of both jurisdictions. The property interests, liabilities and obligations of the entity remain unchanged. S.B. 1442, Sec. 17.

551 TBOC §10.103.

552 TBOC §10.106.

conversion and continuance transaction, Section 10.103(a) was revised by S.B. 1442 to provide that, a description of such conversion is not necessary in the plan of conversion. In addition, a statement must be included in the plan of conversion to the effect that the converting entity is electing to continue its existence in its current organizational form and jurisdiction of formation after the conversion becomes effective.[553]

If the converted entity is a domestic partnership, the partnership agreement must contain provisions that authorize the conversion provided for in the plan of conversion adopted by the partnership. The domestic partnership must approve the plan of conversion in the manner provided in its partnership agreement.[554] A domestic non-profit corporation is prohibited from converting into a for-profit entity.[555]

After approval of a plan of conversion, a certificate of conversion must be filed for the conversion to become effective if any domestic entity that is a party to the conversion is a filing entity or any domestic entity to be created under the plan of conversion is a filing entity. The certificate of conversion must include either the plan of conversion or alternative required statements. The alternative required statements must include that a signed plan of conversion is on file at the principal place of business of the converted entity and will be on file after the conversion at the principal place of business of the converted entity and, in each case, the address of the principal place of business, and that a copy of the plan of conversion will be on written request furnished without cost by the converting entity before the conversion, or by the converted entity after the conversion, to any owner or member of the converting entity or the converted entity. The certificate of conversion must also state that the plan of conversion has been approved as required by the laws of the jurisdiction of formation and the governing documents of the converting entity.[556]

For conversion and continuance transactions, the certificate of conversion must be titled a "certificate of conversion and continuance" and must include a statement certifying that the converting entity is electing to continue its existence in its current organizational form and jurisdiction of formation.[557]

C. Interest Exchanges. The Code also permits domestic entities and non-Code organizations to adopt a plan of exchange pursuant to which the entities would effect an "interest exchange" in which all of the outstanding ownership or membership interests in one or more classes or series of one or more domestic entities are acquired. If a non-Code organization is to acquire ownership or membership interests in the exchange, the non-Code organization must take all action that is required under the laws of the organization's jurisdiction of formation and the organization's governing documents to effect the exchange.

The issuance of the ownership or membership interests in any non-Code organization must also be permitted by the laws under which the non-Code organization is incorporated or organized and not inconsistent with those laws. A plan of exchange may not be affected if an owner or member of a domestic entity that is a party to the interest exchange will, as a result of the plan, become personally liable, without the consent of the owner or member, for the liabilities or obligations of any other person or organization.[558]

The plan of exchange must include the manner and basis of exchanging the ownership or membership interests to be acquired for (A) ownership or membership interests, obligations, rights to purchase securities, or other securities of one or more of the acquiring organizations is a party to the plan of exchange; (B) cash; (C) other property, including ownership or membership interests, obligations, rights to purchase securities, or other securities of any other person or entity; or (D) any combination of those items. The manner and basis of

553 S.B. 1442, Sec. 16.

554 TBOC §10.107.

555 TBOC §10.108.

556 TBOC §10.154.

557 S.B. 1442, Sec. 18; TBOC §10.154(c).

558 TBOC §10.051.

exchanging an ownership or membership interest of an owner or member that is exchanged in a manner or basis different from any other owner or member having ownership or membership interests of the same class or series must be included in the plan of exchange.[559]

If a domestic partnership is a party to the interest exchange and its partnership interests are to be acquired, the domestic partnership must approve the plan of exchange in the manner provided by its partnership agreement, and the partnership agreement of such domestic partnership must authorize the partnership interest exchange adopted by the partnership. Each acquiring domestic partnership must take all actions that may be required by its partnership agreement in order to affect the exchange.[560]

Upon effectiveness of an interest exchange, the ownership or membership interest of each acquired organization is exchanged as provided in the plan of exchange, and the former owners or members whose interests are exchanged under the plan of exchange are entitled only to the rights provided in the plan of exchange or, if dissenters' rights are applicable, a right to receive the fair value of the ownership interests. In addition, the acquiring organization has all rights, title and interests with respect to the ownership or membership interest to be acquired by it subject to the provisions of the plan of exchange.[561]

The provisions relating to filing of a certificate of exchange are generally parallel to those for filing a certificate of merger under the Code.[562]

D. Sales of Assets. For property transfers and dispositions, the Code contains broad, enabling provisions that authorize a domestic entity to sell, lease, assign or otherwise transfer or convey an interest in its property, including real property. The transfer and conveyance may be made with or without the goodwill of the entity on any terms and conditions and for any consideration and may be made by a deed with or without the seal of the entity. Similarly, a domestic entity may grant a pledge, mortgage or deed of trust with respect to an interest in its property including real property with or without the seal of the entity.[563] No approval of the owners or members of the entity is required except as otherwise provided in the Code, governing documents of the domestic entity or specific limitations established by its governing authority.[564]

The Code specifically provides that a disposition of all or part of the property of a domestic entity, regardless of whether the disposition requires the approval of the entity's owners or members, is not a merger or conversion for any purpose. Except as otherwise expressly provided by another statute, a person acquiring property may not be held responsible or liable for a liability or obligation of the transferring domestic entity that is not expressly assumed by the person.[565]

The requirements for approval by owners or members of sales of all or substantially all of the assets of the entity have been retained in the Code, where applicable, in the titles governing the separate types of entities. Thus, for example, the requirement that the shareholders approve the sale of all or substantially all of the assets of a for-profit corporation is contained in § 21.455 of the Code.

E. General. A common problem to avoid in filing of the certificate of merger or conversion is failure to provide a certificate from the Texas Comptroller evidencing the good standing of the domestic entities involved in the merger or conversion. In the alternative, a statement can be set forth in the certificate of merger or conversion that one or more of the surviving new or acquiring organizations in the merger or the converted entity is liable for the payment of the required franchise taxes.[566]

The procedures for approval of fundamental business transactions by the

559 TBOC §10.052.

560 TBOC §10.056.

561 TBOC §10.055.

562 TBOC §§10.151 and 10.153.

563 TBOC §10.251.

564 TBOC §10.252.

565 TBOC §10.254.

566 TBOC §10.156.

governing authority, owners or members of domestic entities are generally located in the separate titles governing those types of entities. The primary exception to this rule is the provisions contained in Chapter 10 governing the approvals by partnerships of fundamental business transactions.

A merger, interest exchange or conversion can be abandoned by any of the domestic parties that are party to the merger, interest exchange or conversion under the procedures provided by the plan of merger, interest exchange or conversion or, if no abandonment procedures are provided, in the manner determined by the governing authority. Such abandonment can occur before the filing of the certificate of merger, interest exchange or conversion and after approval of the merger, interest exchange or conversion by the owners or members.[567] In addition, if the certificate of merger, interest exchange or conversion provides for a delay in effectiveness of the merger, interest exchange or conversion, the merger, interest exchange or conversion can be abandoned before its effectiveness.[568]

While the Code does not expand the provisions for dissenters' rights beyond the types of entities that had such provisions under the prior statutes, the Code does permit partnerships and limited liability companies to adopt the Code's provisions for dissenters' rights in their governing documents.[569]

567 TBOC §10.201.

568 TBOC §10.202.

569 TBOC §10.351.

INDEX OF SUPPLEMENTAL MATERIALS

1. Sample Form of Certificate of Formation of Texas For-Profit Corporation

2. Sample Form of Certificate of Bylaws of Texas For-Profit Corporation

3. Texas Secretary of State Form 808 (Early Adoption of the Business Organizations Code by an Existing Domestic Entity)

SAMPLE FORM OF

CERTIFICATE OF FORMATION

OF TEXAS

FOR-PROFIT CORPORATION

The undersigned person, having the capacity to contract and acting as organizer under the Texas Business Organizations Code (the "Code"), hereby adopts the following Certificate of Formation:

1. The type of entity being formed is a for-profit corporation.

2. The name of the corporation is _____.

3. The corporation is formed for the purpose of engaging in any lawful act, activity and/or business for which corporations may be formed under the Code.

4. The aggregate number of shares that the corporation shall have authority to issue is _____ (_____) shares of common capital stock, par value _____ ($_____) per share.

[Optional (to also authorize Preferred Stock):

[4. (a) The aggregate number of shares of all classes of stock which the corporation shall have authority to issue is _____, consisting of (i) _____ shares of Preferred Stock, par value $_____ per share ("Preferred Stock"), and (ii) _____ shares of Common Stock, par value $_____ per share ("Common Stock").

(b) The Board of Directors is hereby expressly authorized, by resolution or resolutions from time to time adopted, to provide, out of the unissued shares of Preferred Stock, for the issuance of series of Preferred Stock. Before any shares of any such series are issued, the Board of Directors shall fix and state, and hereby is expressly

empowered to fix, by resolution or resolutions, the designations, preferences, and relative, participating, optional or other special rights of the shares of each such series, and the qualifications, limitations or restrictions thereon.

The powers, preferences and relative, participating, optional and other special rights of each series of Preferred Stock, and the qualifications, limitations or restrictions thereof, if any, may differ from those of any and all other series at any time outstanding. All shares of any one series of Preferred Stock shall be identical in all respects with all other shares of such series, except that shares of any one series issued at different times may differ as to the date from which dividends thereof shall be cumulative. The Board of Directors may increase the number of shares of the Preferred Stock designated for any existing series by a resolution adding to such series authorized and unissued shares of the Preferred Stock not designated for any other series. The Board of Directors may decrease the number of shares of Preferred Stock designated for any existing series by a resolution, subtracting from such series unissued shares of the Preferred Stock designated for such series, and the shares so subtracted shall become authorized, unissued and undesignated shares of the Preferred Stock.]

5. The address of its initial registered office is _____, and the name of its initial registered agent at such address is _____.

6. The number of directors of this corporation shall be fixed from time to time in the manner provided in the Bylaws of the corporation. The number of directors constituting the initial Board of Directors is _____ (____), and the name and address of such persons who are to serve as directors until the first annual meeting of the shareholders or until his/her successor is elected and qualified are:

Name	Address
_____	_____ _____
_____	_____ _____
_____	_____ _____

The Board of Directors shall have the power to alter, amend or repeal the Bylaws of the corporation or to adopt new Bylaws.

7. The name and address of the organizer is:

Name	Address
_____	_____ _____ _____

[Optional:

8. The Board of Directors of the corporation, in its sole discretion, shall have the power, on behalf of the corporation, to indemnify persons for whom indemnification is permitted by applicable Texas law, to the fullest extent permissible under applicable Texas law, and may purchase such liability, indemnification and/or other similar insurance as the Board of Directors from time to time shall deem necessary or appropriate, in its sole discretion.]

[Optional:

9. No member of the Board of Directors of the corporation shall be liable, personally or otherwise, in any way to the corporation or its shareholders for monetary damages caused in any way by an act or omission occurring in the director's capacity as a

director of the corporation, except as otherwise expressly provided by applicable Texas law.]

[Optional:

10. Any action required by the Code to be taken at any annual or special meeting of the shareholders of the corporation, and/or any action that may be taken at any annual or special meeting of the shareholders of the corporation, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holder or holders of shares having not less than the minimum number of votes that would be necessary to take such action at a meeting at which the holders of all shares entitled to vote on the action were present and voted.]

[Other Optional Provisions:

11. Consider adding provisions authorizing preemptive rights.

12. Consider adding provisions authorizing cumulative voting for directors.]

EXECUTED this ____ day of _____, 20___.

_____

Organizer Name:_____

SAMPLE FORM OF

BYLAWS

OF TEXAS FOR-PROFIT CORPORATION

ARTICLE I.

OFFICES

Section 1.01. Registered Office. The registered office of the corporation shall be located at such place within the State of Texas as the Board of Directors may from time to time determine. The initial registered office of the corporation shall be as specified in the Certificate of Formation of the corporation.

Section 1.02. Other Offices. The corporation may also have offices at such other places, either within or without the State of Texas, as the board of directors may from time to time determine or as the business of the corporation may require.

ARTICLE II.

MEETINGS OF SHAREHOLDERS

Section 2.01. Location. All annual meetings of shareholders shall be held at the principal executive offices of the corporation, or at such other place, within or without the State of Texas, as may be designated by the board of directors and stated in the notice of the meeting or in a duly executed waiver of notice thereof. All special meetings of shareholders shall be held at such location, within or without the State of Texas, as may be designated by the board of directors or as may be stated in the notice of the meeting or in a duly executed waiver of notice thereof. The board of directors may determine that a meeting will have no designated location because it is to be held solely by means of a conference telephone or other communication system authorized in Section 2.13 of these Bylaws.

Section 2.02. Annual Meetings. Annual meetings of shareholders shall be held at such time and date as may be designated by the Board of Directors, at which the shareholders shall elect directors and transact such other business as may properly be brought before the meeting.

Section 2.03. Special Meetings. Special meetings of the shareholders may be called by the president, the board of directors or the holders of not less than ten percent (10%) of all shares entitled to vote at the meeting.

Section 2.04. Notice. Written or printed notice stating the location, day and hour of the meeting and, in the case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten (10) nor more than sixty (60) days before the day of the meeting, either personally, by electronic transmission or by mail, by or at the direction of the

president, the secretary or the officer or person calling the meeting, to each shareholder entitled to vote at such meeting. If the meeting is held solely by using a conference telephone or other communication system authorized by Section 2.13 of these Bylaws, no location for the meeting need be specified in the notice of the meeting. If the meeting is held solely or in part by using a conference telephone or other communication system authorized by Section 2.13, the form of communication system to be used for the meeting and the means for accessing the communication system must be stated in the notice.

Section 2.05. Quorum. The holders of a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at meetings of shareholders.

Section 2.06. Votes Required for Action. With respect to any matter, other than the election of directors or a matter for which the affirmative vote of the holders of a specified portion of the shares entitled to vote is required by the Texas For-Profit Corporation Law, which is a part of the Texas Business Organizations Code (the "TBOC"), the affirmative vote of the holders of a majority of the shares entitled to vote on that matter and represented in person or by proxy at a meeting of shareholders at which a quorum is present shall be the act of the shareholders, unless otherwise provided by the Certificate of Formation in accordance with the TBOC. Unless otherwise provided in the Certificate of Formation in accordance with the TBOC, directors shall be elected by a plurality of the votes cast by the holders of shares entitled to vote in the election of directors at a meeting of shareholders at which a quorum is present.

Section 2.07. Voting Rights. Each outstanding share, regardless of class, shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders, except to the extent that the voting rights of the shares of any class are limited or denied by the Certificate of Formation or the TBOC.

Section 2.08. Proxies. A shareholder may vote in person or by proxy executed in writing by the shareholder. A telegram, telex, cablegram or other form of electronic transmission, including telephonic transmission, by the shareholder, or a photographic, photostatic, facsimile or similar reproduction of a writing executed by the shareholder is considered an execution in writing for purposes of this Section. Any electronic transmission must contain or be accompanied by information from which it can be determined that the transmission was authorized by the shareholder. No proxy shall be valid after eleven (11) months from the date of its execution unless otherwise provided in the proxy. Each proxy shall be revocable unless the proxy form conspicuously states that the proxy is irrevocable and the proxy is coupled with an interest.

Section 2.09. List of Shareholders. The officer or agent having charge of the stock transfer books shall prepare, not later than the eleventh (11^{th}) day before the date of each meeting of shareholders, a complete list of the shareholders entitled to vote at such meeting or any adjournment thereof, arranged in alphabetical order, with the address of and the type and number of shares held by each shareholder, which list, for a period of ten (10) days prior to such meeting, shall be kept on file at the registered office or principal place of business of the corporation and shall be subject to inspection by any shareholder at any time during the usual business hours. Alternatively, the list of the shareholders may be kept on a reasonably accessible electronic

network, if the information required to gain access to the list is provided with the notice of the meeting. This Section does not require the corporation to include any electronic contact information of any shareholder on the list. If the corporation elects to make the list available on an electronic network, the corporation shall take reasonable steps to ensure that the information is available only to shareholders of the corporation. The list of shareholders shall be produced and kept open at the meeting and shall be subject to the inspection of any shareholder during regular business hours. If the meeting is held by means of remote communication, the list must be open to the examination of any shareholder for the duration of the meeting on a reasonably accessible electronic network, and the information required to access the list must be provided to shareholders with the notice of the meeting. The original share transfer records shall be prima facie evidence of the shareholders entitled to examine such list or transfer records or to vote at any such meeting of shareholders.

Section 2.10. Closing of Share Transfer Records and Fixing Record Date for Matters Other than Consents to Action. For the purpose of determining shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, or entitled to receive a distribution by the corporation (other than a distribution involving a purchase or redemption by the corporation of any of its own shares) or a share dividend, or in order to make a determination of shareholders for any other proper purpose (other than determining shareholders entitled to consent to action by shareholders proposed to be taken without a meeting of the shareholders), the board of directors may provide that the share transfer records shall be closed for a stated period not to exceed, in any case, sixty (60) days. If the share transfer records shall be closed for the purpose of determining shareholders entitled to notice of or to vote at a meeting of shareholders, such records shall be closed for at least ten (10) days immediately preceding such meeting. In lieu of closing the share transfer records, the board of directors may fix in advance a date as the record date for any such determination of shareholders, such date in any case to be not more than sixty (60) days, and, in case of a meeting of shareholders, not less than ten (10) days, prior to the date on which the particular action requiring such determination of shareholders is to be taken. If the share transfer records are not closed and no record date is fixed for the determination of shareholders entitled to notice of or to vote at a meeting of shareholders, or shareholders entitled to receive a distribution by the corporation (other than a distribution involving a purchase or redemption by the corporation of any of its own shares) or a share dividend, the date on which the notice of the meeting is mailed or given or the date on which the resolutions of the board of directors declaring such dividend is adopted, as the case may be, shall be the record date for such determination of shareholders. When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this Section, such determination shall apply to any adjournment thereof, except where the determination has been made through the closing of the share transfer records and the stated period of closing has expired.

Section 2.11. Fixing Record Dates for Consents to Action. Unless a record date shall previously have been fixed or determined pursuant to Section 2.10 or this Section 2.11 of these Bylaws, whenever action by shareholders is proposed to be taken by consent in writing without a meeting of the shareholders, the board of directors may fix a record date for the purpose of determining shareholders entitled to consent to that action, which record date shall not precede, and shall not be more than ten (10) days after, the date upon which the resolution fixing the

record date is adopted by the board of directors. If no record date has been fixed by the board of directors and the prior action of the board of directors is not required by the TBOC, the record date for determining shareholders entitled to consent to action in writing without a meeting shall be the first date on which a signed written consent setting forth the action taken or proposed to be taken is delivered to the corporation by delivery to its registered office, its principal place of business, or an officer or agent of the corporation having custody of the books in which proceedings of meetings of shareholders are recorded, with such delivery made by hand or by certified or registered mail, return receipt requested, and in the case of delivery to the corporation's principal place of business, with such delivery addressed to the president of the corporation. If no record date shall have been fixed by the board of directors and prior action of the board of directors is required by the TBOC, the record date for determining shareholders entitled to consent to action in writing without a meeting shall be at the close of business on the date on which the board of directors adopts a resolution taking such prior action.

Section 2.12. Action Without Meeting.

(1) Any action required by law to be taken at a meeting of the shareholders, and/or any action that may be taken at a meeting of the shareholders, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by all of the holders of all shares that would have been entitled to vote on the action if such action were presented and voted on at a meeting of the shareholders.

(2) A telegram, telex, cablegram, or other electronic transmission by a shareholder consenting to an action to be taken is considered to be written, signed, and dated for the purposes of this Section if the transmission sets forth or is delivered with information from which the corporation can determine that the transmission was transmitted by the shareholder and the date on which the shareholder transmitted the transmission. Any photographic, photostatic, facsimile, or similarly reliable reproduction of a consent in writing signed by a shareholder may be substituted or used instead of the original writing for any purpose for which the original writing could be used, if the reproduction is a complete reproduction of the entire original writing.

Section 2.13. Telephone or Remote Communication Meetings. Shareholders may participate in and hold a meeting by means of conference telephone or similar communication equipment, or another suitable electronic communications system, including videoconferencing technology or the Internet, or any combination, if the telephone or other equipment or system permits each person participating in the meeting to communicate with all other persons participating in the meeting. If voting is to take place at the meeting, reasonable measures must be implemented to verify that every shareholder voting at the meeting by means of remote communications is sufficiently identified, and a record of any vote or other action taken must be kept. Participation in such a meeting shall constitute presence in person at the meeting, except where a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

ARTICLE III.

DIRECTORS

Section 3.01. Management. The powers of the corporation shall be exercised by or under the authority of, and the business and affairs of the corporation shall be managed under the direction of its board of directors, which may exercise all such powers of the corporation and do all such lawful acts and things as are not by law or by the Certificate of Formation or by these Bylaws directed or required to be exercised and done by the shareholders.

Section 3.02. Number; Election; Term; Qualification; Removal. The number of directors of the corporation shall be such number as shall be from time to time specified by resolution of the board of directors; provided, however, that no director's term shall be shortened by reason of a resolution reducing the number of directors. The directors shall be elected at the annual meeting of the shareholders, except as provided in Section 3.03, and each director elected shall hold office for the term for which he is elected and until his successor is elected and qualified. Directors need not be residents of the State of Texas or shareholders of the corporation. Any director may be removed at any time, with or without cause, at a special meeting of the shareholders called for that purpose.

Section 3.03. Resignations; Vacancies. A director may resign at any time by giving written notice to the board of directors or the chairman of the board. Such resignation shall take effect at the date of receipt of such notice or at any later time specified therein; and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective. Any vacancy occurring in the board of directors may be filled by the affirmative vote of a majority of the remaining directors (or by the sole remaining director) though less than a quorum of the board of directors, or may be filled by an election at an annual or special meeting of the shareholders called for that purpose; provided, however, that if the vacancy is caused by reason of an increase in the number of directors, the board of directors may vote to fill not more than two such directorships during the period between any two successive annual meetings of shareholders. A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office, or until the next election of one or more directors by shareholders if the vacancy is caused by an increase in the number of directors.

Section 3.04. Location of Meetings. Meetings of the board of directors, regular or special, may be held either within or without the State of Texas.

Section 3.05. Regular Meetings. Regular meetings of the board of directors may be held without notice at such time and at such place as shall from time to time be determined by the board of directors.

Section 3.06. Special Meetings. Special meetings of the board of directors may be called by the chairman of the board or the president and shall be called by the secretary on the written request of any director. Written notice of special meetings of the board of directors shall be given to each director at least three (3) days before the date of the meeting. Neither the business

to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such meeting.

Section 3.07. Quorum; Votes Required. A majority of the directors shall constitute a quorum for the transaction of business and the act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless a greater number is required by law or the Certificate of Formation.

Section 3.08. Action Without Meeting. The board of directors or committee of the board of directors may take action without holding a meeting, providing notice, or taking a vote if each director or member of the committee entitled to vote on the action signs a written consent or consents stating the action taken. Any photographic, photostatic, facsimile, or similarly reliable reproduction of a consent in writing signed by a director or member of the committee may be substituted or used instead of the original writing for any purpose for which the original writing could be used, if the reproduction is a complete reproduction of the entire original writing. Advance notice is not required to be given to take any action by written consent. Such consent shall have the same force and effect as a unanimous vote at a meeting of the board of directors or the committee, as the case may be, duly called and held.

Section 3.09. Telephone Meetings. Directors and committee members may participate in and hold a meeting by means of conference telephone or similar communication equipment, or another suitable electronic communications system, including videoconferencing technology or the Internet, or any combination, if the telephone or other equipment or system permits each person participating in the meeting to communicate with all other persons. If voting is to take place at the meeting, reasonable measures must be implemented to verify that every director or committee member voting at the meeting by means of remote communications is sufficiently identified, and a record of any vote or other action taken must be kept. Participation in such a meeting shall constitute presence in person at the meeting, except where a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

Section 3.10. Committees of Directors. The board of directors, by resolution adopted by a majority of the whole board, may designate from among its members one or more committees, each of which shall be comprised of one or more of its members. Any such committee, to the extent provided in such resolution, shall have and may exercise all of the authority of the board of directors in the business and affairs of the corporation except where the action of the board of directors is required, or the authority of such committee is limited, by statute. The number of members on each committee may be increased or decreased from time to time by resolution of the board of directors. Any member of any committee may be removed from such committee at any time by resolution of the board of directors. Vacancies in the membership of a committee (whether by death, resignation, removal or otherwise) may be filled by resolution of the board of directors. The time, place and notice (if any) of meetings of any committee shall be determined by such committee. At meetings of any committee, a majority of the number of members of such committee shall constitute a quorum for the transaction of business, and the act of a majority of the members present at any meeting at which a quorum is present shall be the act of

such committee, except as otherwise specifically provided by statute, the Certificate of Formation, or these Bylaws.

Section 3.11. Compensation of Directors. The directors may be paid their expenses, if any, of attendance at each meeting of the board of directors and may be paid a fixed sum for attendance at each meeting of the board of directors or a stated salary as director. No such payment shall preclude any director from serving the corporation in any other capacity and receiving compensation therefor. Members of committees of the board may be allowed like compensation for attending committee meetings.

ARTICLE IV.

NOTICES

Section 4.01. General. Notices to shareholders, directors and committee members shall be in writing and may be delivered personally or mailed by U.S. mail, postage prepaid, to the shareholders, directors or committee members, respectively, at their addresses appearing on the books and share transfer records of the corporation. Notice to shareholders shall be deemed to be given at the time when the same shall be so delivered or mailed. Notice to directors and committee members may also be given by nationally recognized overnight delivery or courier service or facsimile transmission, and shall be deemed given when such notice shall be received by the proper recipient or, if earlier, (i) in the case of an overnight delivery or courier service, one (1) day after such notice is sent by such overnight delivery or courier service; and (ii) in the case of mailing by U.S. mail, three (3) days after such notice is mailed as described above. On consent of a shareholder, director or committee member, notice from the corporation may be given to the shareholder, director or committee member by electronic transmission. The shareholder, director or committee member may specify the form of electronic transmission to be used to communicate notice. The shareholder, director or committee member may revoke this consent by written notice to the corporation. The consent is deemed to be revoked if the corporation is unable to deliver by electronic transmission two consecutive notices, and the person responsible for delivering notice on behalf of the corporation knows that delivery of these two electronic transmissions was unsuccessful. The inadvertent failure to treat the unsuccessful transmissions as a revocation of consent does not invalidate a meeting or other action. Notice by electronic transmission is deemed given when the notice is (i) transmitted to a facsimile number provided by the shareholder, director or committee member for the purpose of receiving notice; (ii) transmitted to an electronic mail address provided by the shareholder, director or committee member for the purpose of receiving notice; (iii) posted on an electronic network and a message is sent to the shareholder, director or committee member at the address provided by the shareholder, director or committee member for the purpose of alerting the shareholder, director or committee member of a posting; or (iv) communicated to the shareholder, director or committee member by any other form of electronic transmission consented to by the shareholder, director or committee member.

Section 4.02. Waivers. Whenever any notice is required to be given to any shareholder, director or committee member under the provisions of law or of the Certificate of Formation or of these Bylaws, a waiver thereof in writing signed by the person or persons entitled to such

notice, whether before or after the time stated therein, shall be equivalent to the giving of such notice.

Section 4.03. Attendance as Waiver. Attendance of a director or member of a committee at a meeting shall constitute a waiver of notice of such meeting, except where a director or committee member attends a meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

Section 4.04. Omission of Notice to Shareholders. Any notice required to be given to any shareholder under any provision of the TBOC, the Certificate of Formation or these Bylaws need not be given to the shareholder if (1) notice of two consecutive annual meetings and all notices of meetings held during the period between those annual meetings, if any, or (2) all (but in no event less than two) payments (if sent by first class mail) of distributions or interest on securities during a twelve (12) month period have been mailed to that person, addressed at his address as shown on the share transfer records of the corporation, and have been returned undeliverable. Any action or meeting taken or held without notice to such a person shall have the same force and effect as if the notice had been duly given. If such a person delivers to the corporation a written notice setting forth his then current address, the requirement that notice be given to that person shall be reinstated.

ARTICLE V.

OFFICERS

Section 5.01. General. The officers of the corporation shall consist of a president and a secretary and may also include a chairman of the board, a vice-chairman of the board, one or more vice presidents, one or more assistant secretaries, and a treasurer and one or more assistant treasurers, each of whom shall be elected by the board of directors. The chairman and vice-chairman of the board, if any, shall each be members of the board of directors, but no other officers of the corporation need be a director. Any two or more offices may be held by the same person.

Section 5.02. Election of Officers; Salaries. At the first meeting of the board of directors after each annual meeting of shareholders, the board of directors shall choose a president and a secretary. Such other officers and assistant officers and agents as may be deemed necessary may also be elected or appointed by the board of directors. The salaries of all officers and agents of the corporation shall be fixed by the board of directors.

Section 5.03. Term of Office. The officers of the corporation shall hold office until their respective successors are chosen and qualify. Any officer or agent who is elected or appointed by the board of directors may be removed by the board of directors at any time, for or without cause; provided, that such removal shall be without prejudice to the contract rights, if any, of the person so removed. Any vacancy occurring in any office of the corporation (whether by death, resignation, removal or otherwise) shall be filled by resolution of the board of directors.

Section 5.04. Chairman of the Board. The board of directors may, in its discretion, choose a director to serve as chairman of the board. The chairman of the board, if any, shall preside at meetings of the shareholders and of the board of directors, shall be an ex officio member of all committees, and shall have such other powers and perform such other duties as the board of directors may from time to time prescribe.

Section 5.05. Vice-Chairman of the Board. The board of directors may, in its discretion, choose a director to serve as vice-chairman of the board. The vice-chairman of the board, if any, shall in the absence of the chairman of the board perform the duties and exercise the powers of the chairman of the board, and shall perform such other duties and exercise such other powers as the board of directors may from time to time prescribe.

Section 5.06. President. The president shall be the chief executive officer of the corporation, shall have general and active management of the business of the corporation and shall see that all orders and resolutions of the board of directors are carried into effect. In the event the board of directors shall not have designated a chairman of the board, or in the absence of the chairman of the board, the president shall preside at meetings of the shareholders and the board of directors. The president may sign and execute contracts, agreements and other documents on behalf of the corporation, and may sign and execute bonds, mortgages and other contracts requiring a seal, under the seal of the corporation, except where required or permitted by law to be otherwise signed and executed and except where the signing and execution thereof shall be expressly delegated by the board of directors to some other officer or agent of the corporation. In addition, the president shall have such other powers and perform such other duties as shall be designated by the board of directors from time to time.

Section 5.07. Vice Presidents. The vice presidents, if any, in the order of their seniority, unless otherwise determined by the board of directors, shall, in the absence or disability of the president, perform the duties and exercise the powers of the president. They shall perform such other duties and exercise such other powers as the board of directors may from time to time prescribe.

Section 5.08. Secretary. The secretary shall attend all meetings of the board of directors and all meetings of the shareholders and record all the proceedings of the meetings of the corporation and of the board of directors in a book to be kept for that purpose and shall perform like duties for any committees when required. The secretary shall give, or cause to be given, notice of all meetings of the shareholders and special meetings of the board of directors, and shall perform such other duties as may be prescribed by the board of directors or president, under whose supervision he shall be. The secretary shall keep in safe custody the seal of the corporation and, when authorized by the board of directors, affix the same to any instrument requiring it and, when so affixed, it shall be attested by his signature or by the signature of an assistant secretary, the treasurer or an assistant treasurer.

Section 5.09. Assistant Secretaries. The assistant secretaries, if any, in the order of their seniority, unless otherwise determined by the board of directors, shall, in the absence or disability of the secretary, perform the duties and exercise the powers of the secretary. They

shall perform such other duties and exercise such other powers as the board of directors may from time to time prescribe.

Section 5.10. Treasurer. The treasurer, if any, shall have the custody of the corporate funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the corporation and shall deposit all moneys and other valuable effects in the name and to the credit of the corporation in such depositories as may be designated by the board of directors. In the absence of the election or appointment of a treasurer or any assistant treasurers by the board of directors, the duties of the office of treasurer shall be performed by the secretary of the Corporation. The treasurer shall disburse the funds of the corporation as may be ordered by the board of directors, taking proper vouchers for such disbursements, and shall render to the president and the board of directors at its regular meetings or when the board of directors so requires an account of all his transactions as treasurer and of the financial condition of the corporation. If required by the board of directors, he shall give the corporation a bond in such sum and with such surety or sureties as shall be satisfactory to the board of directors for the faithful performance of the duties of his office and for the restoration to the corporation, in case of his death, resignation, retirement or removal from office, of all books, papers, vouchers, money and other property of whatever kind in his possession or under his control belonging to the corporation.

Section 5.11. Assistant Treasurers. The assistant treasurers, if any, in the order of their seniority, unless otherwise determined by the board of directors, shall, in the absence or disability of the treasurer, perform the duties and exercise the powers of the treasurer. They shall perform such other duties and exercise such other powers as the board of directors may from time to time prescribe.

ARTICLE VI.

SHARES OF STOCK

Section 6.01. Certificates. The corporation shall deliver certificates representing all shares to which shareholders are entitled; and such certificates shall be signed by the president or a vice president, and the secretary or an assistant secretary of the corporation, and may be sealed with the seal of the corporation or a facsimile thereof. Each certificate representing shares shall state upon the front thereof that the corporation is organized under the laws of the State of Texas, the name of the person to whom issued, the number and class and the designation of the series, if any, that such certificate represents, and the par value of each share represented by such certificate or a statement that the shares are without par value.

Section 6.02. Shares of More than One Class. If the corporation is authorized to issue shares of more than one class or series, each certificate representing shares issued by the corporation shall conspicuously state on the front or back of the certificate (1) the designations, preferences, limitations and relative rights of the shares of each class or series to the extent they have been determined and the authority of the board of directors to make those determinations as to subsequent series; or (2) that the information required by clause (1) is stated in the Certificate of Formation on file in the office of the Secretary of State and that the corporation will furnish a

free copy of that information to the record holder of the certificate on written request to the corporation at its principal place of business or registered office.

Section 6.03. Signatures. The signatures of the president or vice president and the secretary or assistant secretary upon a certificate may be facsimiles, if the certificate is countersigned by a transfer agent, or registered by a registrar, other than the corporation itself or an employee of the corporation. In case any officer who has signed or whose facsimile signature has been placed upon such certificate shall have ceased to be such officer before such certificate is issued, it may be issued by the corporation in the same manner and with the same effect as if he or she were such officer at the date of the issuance.

Section 6.04. Lost Certificates. The board of directors may direct a new certificate or certificates to be issued in place of any certificate or certificates theretofore issued by the corporation alleged to have been lost or destroyed, upon the making of an affidavit of that fact by the person claiming the certificate of stock to be lost or destroyed. When authorizing such issue of a new certificate or certificates, the board of directors may, in its discretion and as a condition precedent to the issuance thereof, require the owner of such lost or destroyed certificate or certificates, or his legal representative, to advertise the same in such manner as it shall require and/or to give the corporation a bond in such sum as it may direct as indemnity against any claim that may be made against the corporation with respect to the certificate alleged to have been lost or destroyed.

Section 6.05. Transfer of Certificates. Upon surrender to the corporation or the transfer agent of the corporation of a certificate for shares duly endorsed or accompanied by proper evidence of succession, assignment or authority to transfer, it shall be the duty of the corporation to issue a new certificate to the person entitled thereto, cancel the old certificate and record the transaction upon its books.

Section 6.06. Restriction of Transfer of Shares. If the corporation issues any shares that are not registered under the Securities Act of 1933, as amended, and registered or qualified under any applicable state securities laws, the transfer of any such shares shall be restricted in accordance with applicable law and a legend describing such restrictions shall be set forth on the front or back of each certificate representing such shares. In the event any restriction on the transfer, or registration of the transfer, of shares shall be imposed or agreed to by the corporation, each certificate representing shares so restricted (1) shall conspicuously set forth a full or summary statement of the restriction on the front of the certificate, or (2) shall set forth such statement on the back of the certificate and conspicuously refer to the same on the front of the certificate, or (3) shall conspicuously state on the front or back of the certificate that such a restriction exists pursuant to a specified document and (a) that the corporation will furnish to the record holder of the certificate a free copy of the specified document upon written request to the corporation at its principal place of business or registered office, or (b) if such document has been filed in accordance with the TBOC, that such document is on file in the office of the Secretary of State and contains a full statement of such restriction.

Section 6.07. Registered Holders of Shares. Unless otherwise provided in the TBOC, and subject to the provisions of Chapter 8 - Investment Securities of the Texas Business and Commerce Code, as amended:

(1) The corporation may consider the person registered as the owner of a share in the share transfer records of the corporation at any particular time (including, without limitation, as of a record date fixed pursuant to Section 2.10 or 2.11 of these Bylaws) as the owner of that share at that time for purposes of voting that share, receiving distributions or notices in respect thereof, transferring the share, exercising rights of dissent with respect to that share, exercising or waiving any preemptive right with respect to that share, entering into any agreements with respect to that share in accordance with the TBOC, or giving proxies with respect to that share; and

(2) Neither the corporation nor any of its officers, directors, employees or agents shall be liable for regarding that person as the owner of that share at that time for those purposes, regardless of whether that person does not possess a certificate representing that share.

ARTICLE VII.

INDEMNIFICATION

Section 7.01. General. The corporation shall indemnify persons for whom indemnification is permitted by the TBOC to the fullest extent permissible under the TBOC, and may purchase such indemnification insurance as the Board of Directors from time to time shall determine.

ARTICLE VIII.

GENERAL PROVISIONS

Section 8.01. Books and Records. The corporation shall keep books and records of account and shall keep minutes of the proceedings of the shareholders, the board of directors and each committee of the board of directors. The corporation shall keep at its registered office or, whether within or outside the state of Texas, at its principal place of business or at the office of its transfer agent or registrar, a current record of the original issuance of shares issued by the corporation and a record of each transfer of those shares that have been presented to the corporation for registration of transfer. Such records shall contain the names and mailing addresses of all past and current shareholders and the number and class or series of shares issued by the corporation held by each of them. Any books, records, minutes and share transfer records may be in written paper form or in any other form capable of being converted into written paper form within a reasonable time.

Section 8.02. Checks. All checks or demands for money and notes of the corporation shall be signed by such officer or officers or such other person or persons as the board of directors may from time to time designate.

Section 8.03. Fiscal Year. The fiscal year of the corporation shall be fixed by the resolution of the board of directors.

Section 8.04. Seal. The corporate seal shall have inscribed thereon the name of the corporation, the year of its organization and the words "Corporate Seal, Texas." The seal may be used by causing it or a facsimile thereof to be impressed or affixed or in any other manner reproduced.

Section 8.05. Construction. Whenever the context or circumstances so require, for all terms used herein the masculine shall include the feminine and neuter, and the singular shall include the plural, and vice versa. If any provision of these Bylaws shall be held illegal, invalid or inoperative, then, so far as is reasonable and possible (1) the remainder of the Bylaws shall be and remain legal, valid and operative and (2) effect shall be given the intent manifested by the provision held illegal, invalid or inoperative and to that end, such illegal, invalid or inoperative provision shall be deemed to have been replaced by a provision that is as similar to such illegal, invalid or inoperative provision as possible and still be legal, valid and operative.

Section 8.06. Headings. Headings used in these Bylaws have been inserted for administrative convenience only and do not constitute matter to be construed in interpretation of the substantive provisions of these Bylaws.

ARTICLE IX.

AMENDMENT OF BYLAWS

Section 9.01. General. These Bylaws may be altered, amended or repealed or new bylaws may be adopted by action of the board of directors, subject to repeal or change at any meeting of the shareholders at which a quorum is present, by the affirmative vote of a majority of the shareholders present at such meeting (provided notice of the proposed change or repeal is contained in the notice of the meeting).

Form 808—General Information
(Early Adoption of the Business Organizations Code by an Existing Domestic Entity)

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. *This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.*

Commentary

Until January 1, 2010, the Texas Business Organizations Code (BOC) is not applicable to domestic entities in existence before January 1, 2006. However, under section 402.003 of the BOC, a domestic entity may voluntarily elect to adopt and become subject to the BOC before January 1, 2010, by filing a statement of early adoption with the secretary of state. If necessary, the entity also should file a certificate of amendment to cause its certificate of formation to comply with the BOC.

Instructions for Form

- **Entity Information:** Set forth the name of the organization as stated in its governing document. It is recommended that the date of formation and file number assigned by the secretary of state be provided to facilitate processing of the document.
- **Entity Type:** Check the applicable box to indicate the appropriate entity type.
- **Execution:** Under section 4.001 of the BOC, the early-adoption statement must be signed by a person authorized by the code to act on behalf of the entity in regard to the filing instrument. Generally, a governing person or managerial official of the entity signs a filing instrument.

  Corporation, Professional Association, and Cooperative Association
  An early-adoption statement filed by a corporation (for-profit or nonprofit), professional corporation, professional association, or cooperative association would be signed by an authorized officer (BOC § 20.001).

  Limited Liability Company
  An early-adoption statement filed by a limited liability company would be signed by an authorized manager if the company has managers. If the company does not have managers and is managed by its members, an authorized managing-member must sign the statement. (Please refer to chapter 101 of the BOC for further information.)

  Limited Partnership
  An early-adoption statement filed by a limited partnership must be signed by at least one general partner. The execution by a general partner is an oath or affirmation, under a penalty of perjury, that to the best of the executing party's knowledge and belief, the facts contained in the instrument are true and correct (BOC § 153.553).

  The early-adoption statement need not be notarized. However, before signing, please read the statements on this form carefully. *A person commits an offense under section 4.008 of the BOC if the person signs or directs the filing of a filing instrument the person knows is materially false with the intent that the instrument be delivered to the secretary of state for filing. The offense is a Class A misdemeanor unless the person's intent is to harm or defraud another, in which case the offense is a state jail felony.*

- **Payment and Delivery Instructions**: The filing fee for an early-adoption statement is **$15**, unless the domestic entity is a nonprofit corporation or a cooperative association; the filing fee for an early-adoption statement filed by a nonprofit corporation or cooperative association is **$5**. Fees may be paid by personal checks, money orders, LegalEase debit cards, or MasterCard, Visa, and Discover credit cards. Checks or money orders must be payable through a U.S. bank or financial institution and made payable to the secretary of state. Fees paid by credit card are subject to a statutorily authorized convenience fee of 2.7 percent of the total fees.

  Submit the completed form in duplicate along with the filing fee. The form may be mailed to P.O. Box 13697, Austin, Texas 78711-3697; faxed to (512) 463-5709; or delivered to the James Earl Rudder Office Building, 1019 Brazos, Austin, Texas 78701. If a document is transmitted by fax, credit card information must accompany the transmission (Form 807). On filing the document, the secretary of state will return the appropriate evidence of filing to the submitter together with a file-stamped copy of the document, if a duplicate copy was provided as instructed.

Revised 01/06

Form 808
(Revised 01/06)
Return in duplicate to:
Secretary of State
P.O. Box 13697
Austin, TX 78711-3697
512 463-5555
FAX: 512 463-5709
Filing Fee: See instructions

This space reserved for office use.

Early Adoption of the Business Organizations Code By an Existing Domestic Entity

Entity Information

The name of the domestic entity is:

_____

The date of formation of the entity is: _____

The file number issued to the entity by the secretary of state is: _____

Entity Type

(Select the entity type by checking the appropriate box below.)

- ☐ For-profit Corporation
- ☐ Nonprofit Corporation
- ☐ Cooperative Association
- ☐ Limited Liability Company
- ☐ Professional Corporation
- ☐ Professional Limited Liability Company
- ☐ Professional Association
- ☐ Limited Partnership

Election to Adopt

The domestic entity voluntarily elects to adopt and become subject to the Texas Business Organizations Code by filing this statement with the secretary of state.

Execution

The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument.

Date: _____

_____

_____
Signature and title of authorized person (see instructions)