2017 TEXAS LEGISLATIVE UPDATE ON AMENDMENTS TO TEXAS BUSINESS ORGANIZATIONS CODE

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CHAPTER 8

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I. INTRODUCTION

This article summarizes several pieces of legislation that, at the time of the writing of this paper, are expected to be passed by the Texas Legislature in its 2017 Regular Session and that amend the Texas Business Organizations Code (the "*Code*"). There are many other bills that were passed affecting business law, so this article should not be viewed as containing a listing of business-related bills. The article contains summaries only and should not be relied on as a complete description of any bill or portion thereof.

Senate Bill No. 1517 ("*SB 1517*") was authored by Senator Kelly Hancock, sponsored by Representative Rene Oliveira and becomes effective on September 1, 2017. SB 1517 makes several technical and substantive amendments to the Code relating to partnerships and limited liability companies.

Senate Bill No. 1518 ("*SB 1518*") was authored by Senator Kelly Hancock, sponsored by Representative Rene Oliveira and becomes effective on September 1, 2017. SB 1518 makes several technical and substantive amendments to the Code relating to corporations and fundamental business transactions.

Senate Bill No. 1835 ("*SB 1835*") was authored by Senator Craig Estes, sponsored by Representative Jason Villalba, and become effective on June 1, 2018. SB 1835 amends the Code to a "distinguishable name" standard for names of entities. As of the date of writing this report, it was unclear whether the Senate Bill or the companion House Bill No. 2856 would be the final vehicle for passage. References herein to SB 1835 are deemed to be references to House Bill No. 2856 if that becomes the final passed bill.

Unless otherwise indicated, all references to a "Chapter," "Section" or "Subsection" are to a Chapter, Section or Subsection of the Code.

II. SERIES OF LIMITED LIABILITY COMPANIES

SB 1517 amended various provisions of the Code relating to series of limited liability companies. The provisions authorizing series of domestic limited liability companies were added to the Code in 2013 as Subchapter M to Chapter 101.[2]

A. Service of Process.

SB 1517 adds new Subchapter F-1 to provide for the means of service of process, notice, or demand on a series of a domestic limited liability company or a series of a foreign entity. The existing provisions of the Code are unclear on those matters, and service of process, notice, or demand on a series is made more difficult because there are not requirements in the Code for a series to file a filing instrument with the Secretary of State to declare the identity and address of a registered office or agent. Accordingly, the new amendments choose to place the responsibility on the domestic limited liability company or foreign entity of which the series is a part to inform the series of the service of process, notice, or demand. The new means of service for the series are based on existing elements of Subchapters E and F of Chapter 5 applicable to service of process, notice, or demand on entities. Specifically, the new Subchapter F-1 provides that:

(1) the registered agent of a domestic limited liability company or foreign entity under Subchapter E is an agent of each series of the domestic limited liability company or foreign entity for the purpose of service of process, notice, or demand required or permitted by law to be served on a series;[3]

(2) the Secretary of State is an agent of a series of a domestic limited liability company or foreign entity for purposes of service of process, notice, or demand on the series if the Secretary of State is the agent of the company or foreign entity pursuant to Section 5.251, which provides for certain circumstances in which service may be made by service on the Secretary of State;[4]

(3) each governing person of a series of a domestic limited liability company pursuant to Section 101.608 is an agent of the series for the purpose of service of process, notice, or demand required or permitted by law to be served on the series[5]; and

(4) each governing person of a series of a foreign entity is an agent of the series for the purpose of service of process, notice, or demand required or permitted by law to be served on the series.[6]

Any process, notice, or demand to be served on a series of a domestic limited liability company or foreign entity that is served on the registered agent or on the Secretary of State is required to include the name of the domestic limited liability company or foreign entity and the name of the series thereof on which the process, notice, or

[2] Acts 2013, 83rd Leg., R.S., Ch. 9 (S.B. 847), eff. September 1, 2013.

[3] SB1517 §4 adding TBOC §5.302(a).

[4] SB1517 §4 adding TBOC §5.304(a).

[5] SB1517 §4 adding TBOC §5.305(a).

[6] SB1517 §4 adding TBOC §5.305(b).

demand is to be served.[7] Upon receipt of process, notice, or demand to be served on a series, the duties of the registered agent are to receive or accept and forward the process, notice, or demand to the domestic limited liability company or foreign entity at the address most recently provided to the registered agent by such company or entity or otherwise notify such company or entity at the same address regarding the process, notice or demand that is served on or received by the registered agent.[8] Duplicate copies of a process, notice or demand must delivered to the Secretary of State, as required by the existing provisions of the Code.[9] After receipt of process, notice or demand to be served on the series, the Secretary of State is required to send to the domestic limited liability company or foreign entity named in the process, notice or demand one of the duplicate copies thereof received by the Secretary of State as provided in Code Section 5.253.[10] Neither the registered agent nor the Secretary of State are required to forward the process, notice, or demand directly to the series.[11]

New provisions also clarify how service of process on a series is made by a political subdivision. For purposes of Section 5.257 of the Code relating to a process, notice or demand made by a political subdivision of the state, a process, notice or demand may be served on a series of a domestic limited liability company or a series of a foreign entity by delivery to any governing person of the series as described in Section 101.608.[12] If the governing persons of the series are unknown or cannot be found, service on the series of the domestic limited liability company or foreign entity may be made in the same manner as service is made on unknown shareholders under law.[13]

B. Cross-Collateralization of Debts.

Issues have been raised in the past about the power and authority of a series of a limited liability company to agree to pledge its assets to secure the company's general debts or the debts of another series if the company has provisions in its certificate of formation and company agreement that take advantage of the liability shelter provisions of Code Section 101.602(a) to protect a series from liabilities. Amendments effected by SB 1517 clarify that a particular series of a domestic limited liability company, or a limited liability company on behalf of a particular series, may expressly agree in the company agreement or other written agreement that any of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series of the company are enforceable against the assets of the particular series.[14] In addition, a limited liability company can expressly agree in the company agreement or other written agreement that any debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series are enforceable against the assets of the limited liability company generally.[15] These new provisions supersede the liability protections provided to a series in Section 101.602(a) and any provision pursuant thereto in a company agreement or certificate of formation of the limited liability company.[16] As a result of these changes, lenders can now clearly enforce cross-collateralization agreements among various series of the same limited liability company and the limited liability company generally notwithstanding the liability protections previously provided to the series in the statute. These changes are similar to recent amendments made to the Delaware Limited Liability Company Act.

C. Series as a Person.

In 2015, the Texas Business and Commerce Code (the "*TBCC*") was amended to clarify that the term "person" includes, for purposes of the TBCC, a particular series of a for-profit entity thereby confirming that a series of a Texas limited liability company can enter into contracts that are governed by the Uniform Commercial Code as adopted in Texas. This change in the TBCC raised the issue as to whether a series should also be considered a "person" for purposes of the Code. Although a series is not a separate domestic entity for purposes of the Code[17], one amendment in SB 1517 clarifies that a series of a domestic limited liability company or a series of a foreign entity should be considered a "person" for purposes of the Code.[18] Another amendment clarifies that a series of a domestic limited liability company can serve as a promoter, organizer, owner, partner, member, associate or manager of an organization.[19] These amendments clarify the status of a series under the Code.

III. ENTITY NAMES

A. Background.

According to information supplied to the author by a staff person at the office of the Texas Secretary of State, forty-three states have an entity name standard in their governing statutes that require a name to be

[7] SB1517 §4 adding TBOC §§5.302(b), 5.304(b).
[8] SB1517 §4 adding TBOC §5.303(a).
[9] TBOC §5.252(a).
[10] SB1517 §4 adding TBOC §5.304(c).
[11] SB1517 §4 adding TBOC §§5.303(b), 5.304(d).
[12] SB1517 §4 adding TBOC §5.306(a) and (b).
[13] SB1517 §4 adding TBOC §5.306(c).
[14] SB1517 §12 adding TBOC §101.602(c)(1).
[15] SB1517 §12 adding TBOC §101.602(c)(2).
[16] SB1517 §12 adding TBOC §101.602(c).
[17] TBOC §101.622.
[18] SB1517 §1 amending TBOC §1.002(69-b).
[19] SB1517 §13 amending TBOC §101.605.

distinguishable upon the record.[20] In contrast, the more complicated entity name standard found in Chapter 5 of the Code prohibits a domestic filing entity from having a legal name, and a foreign filing entity from registering under a name, that is the same as, deceptively similar to, or similar to the legal or fictitious name of an existing filing entity or an active name reservation or name registration.[21] Names that the office of the Texas Secretary of State determines are similar to an existing entity name can be approved only when a notarized written consent is given by the other party with the similar name.[22] The more complicated three-tiered name conflict standard makes it more difficult for businesses that are formed in other states to register to do business in Texas. Various critics have suggested this more complex standard is out of step with the majority of jurisdictions and often increases the legal costs associated with establishing a new entity in Texas or qualifying a non-Texas entity to do business in Texas and should be modernized.

B. Distinguishable on the Records Standard.

SB 1835 amends the Code to adopt the more modern, business friendly "distinguishable in the records of the secretary of state" name standard. The amendments will make the process of selecting a business entity name in Texas more uniform with the requirements established in other states which in turn would facilitate the formation of new business entities and expedite the registration of out-of-state business entities to transact business in Texas. An exception to the distinguishable name standard is added by authorizing the Secretary of State to accept a name that is not distinguishable on the record when a person delivers evidence of a final court judgment establishing the person's right to the name in Texas.[23] This exception recognizes that a person's right to the use of a specific business name in Texas is not a matter determined by the Secretary of State.

A new definition for the term "fictitious name" is added to identify an assumed name that is adopted by a foreign filing entity, when its legal name as stated in its certificate of formation or similar organizational document is not available for use in Texas, and under which it is registered to transact in business in Texas in accordance with Chapter 9 of the Code.[24] A fictitious name adopted by an entity must meet the name requirements of Chapter 5 of the Code.

After the amendments, the new name of a domestic filing entity or the name under which a foreign filing entity registers to transact business in Texas must be distinguishable in the records of the secretary of state from (a) the name of an existing filing entity or registered foreign filing entity; (b) a name reserved under Chapter 5, Subchapter C; (c) a name registered under Chapter 5, Subchapter D; or (d) a fictitious name under which a foreign filing entity has registered to transact business in Texas when its name is not available.[25] An indistinguishable name will nevertheless be permitted when the other entity or person for whom the name is reserved or registered provides a notarized written consent for use of the name, so long as the Secretary of State does not determine that the names are the same.[26]

Corresponding changes are made to the Code provisions that: (a) govern the name availability standard for name reservations;[27] (b) govern the name availability standard for name registrations that are submitted by banks, trust companies, savings associations, insurance companies, and foreign filing entities that are not transacting business for purposes of registration under Chapter 9;[28] (c) the provisions relating to the availability of a foreign filing entity's name before acceptance of a certificate of reinstatement submitted under Section 9.104;[29] and (d) the provisions relating to the availability of a domestic filing entity's name before acceptance of a certificate of reinstatement submitted under Section 11.202.[30] If the name of the foreign filing entity applying for reinstatement does not comply with the requirements, the entity must contemporaneously amend its registration to change its name or to provide a fictitious name under which the entity will transact business in Texas.[31]

The effective date of the SB 1835 is June 1, 2018.[32] The delayed effective date is needed to provide sufficient time for the Secretary of State to make modifications to current systems, revise or modify forms, amend administrative rules and revise internal training materials.

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[20] Conversation with Ms. Brianna Godbey of the Office of the Secretary of State of the State of Texas.

[21] *See* TBOC §§5.053, 5.102, 5.153, 9.004(b)(1) and 9.105.

[22] *See, e.g.*, TBOC §5.0539(b).

[23] SB1835 §2 adding TBOC §5.002.

[24] SB1835 §1 adding TBOC §1.002(21-a).

[25] SB1835 §3 amending TBOC §5.053(a).

[26] SB1835 §3 amending TBOC §5.053(b) and adding TBOC §5.053(c).

[27] SB1835 §4 amending TBOC §5.102.

[28] SB1835 §5 amending TBOC §5.153. A notarized written consent is not required for an applicant bank, trust company, savings association or insurance company that has been in continuous existence from a date that precedes the date the indistinguishable name is filed with the Secretary of State, so long as the name is not determined to be the same.

[29] SB1835 §6 amending TBOC §9.105.

[30] SB1835 §7 amending TBOC §11.203.

[31] SB1835 §6 amending TBOC §9.105.

[32] SB1835 §8.

C. Penalties for False Consents.

SB 1517 amends Sections 5.0523, 9.105 and 11.203 to clarify that Sections 4.007 and 4.008 apply to a written consent to use of a similar name filed with the Secretary of State pursuant to those Sections.[33] In addition, effective June 1, 2018, SB 1835 amends the definition of "filing instrument" to include a consent filed by or for an entity with the Secretary of State.[34] Accordingly, a written consent to the use of an entity name that is filed with the Secretary of State should be considered a "filing instrument" and subject to the criminal penalties and civil remedies provided in Sections 4.007 and 4.008 of the Code. Sections 4.007 and 4.008 provide for criminal penalties against persons responsible for the filing of a false filing instrument with the Secretary of State as well as civil remedies to aggrieved parties damaged by the filing of a false or forged filing instrument with the Secretary of State.

IV. RATIFICATION OF DEFECTIVE CORPORATE ACTS OR SHARE ISSUANCES

A. Background.

SB 1518 amends Subchapter R of Chapter 21 containing provisions that specify procedures for ratification of defective corporate acts or share issuances by for-profit corporations. Subchapter R was adopted in the 2015 Texas Legislature effective September 1, 2015. These amendments are modeled on recent amendments to similar provisions in Sections 204 and 205 of the Delaware General Corporation Law ("*DGCL*"), but with some variation.

B. Definitions.

The definition of "failure of authorization" is clarified to include the failure of the board of directors or an officer of a for-profit corporation to authorize an act or transaction taken by or on behalf of the corporation.[35] Minor clarifying changes are made to the definition of "overissue."[36] The definition of "validation effective time" is clarified to specify that a future effective time for ratification can be selected by the board of directors if neither shareholder approval nor the filing of a certificate of validation is required.[37]

C. Ratification by Board.

SB 1518 clarifies that multiple resolutions may be adopted by the board of directors at one time to ratify more than one defective corporate act.[38] Other changes clarify that the shareholders approve the ratification of a defective corporate act that is the subject of the board's resolutions rather than adopting the resolutions approved by the board of directors.[39] Another amendment confirms that the ratification procedures in Subchapter R may be used to adopt or endorse any act or transaction taken by or in the name of the corporation before it exists.[40]

D. Shareholder Approval.

Various changes are made throughout Subchapter R to clarify that the shareholders are approving the ratification of the defective corporate act by the board of directors instead of adopting the board resolution that ratifies the defective corporate act.[41]

If shareholder approval of the ratification of the defective corporate act is required, a shareholder meeting must be called and a notice to shareholders must be given.[42] Amendments clarify that the notice to shareholders must be given to each holder of record as of the record date for the shareholders' meeting (as well as to holders of valid and putative shares as of the time of the defective corporate act) and that the ratification of the defective corporate act, rather than the board resolution, is to be submitted to shareholders for approval.[43] The contents of the notice to shareholders have also been revised to allow providing the information specified by Section 21.903(a)(1) through (5) as an alternative to sending a copy of the board resolutions.[44] In addition, the notice must contain a statement that, on shareholder approval of the ratification of the defective corporate act, the holder's rights to challenge the defective corporate act or putative shares will be limited to (a) an action claiming that the ratification not take effect or that it take effect only on certain conditions if the action is filed not later than 120 days after the applicable validation effective time or (b) an action claiming that the ratification was not accomplished in accordance with Subchapter R. In either case, such action must be filed in a court of appropriate jurisdiction.[45]

Amendments clarify that the shareholder approval of the ratification of the election of a director can be by

[33] SB1517 §§ 2, 5 and 6 amending TBOC §§ 5.0523(b), 9.105 and 11.203.

[34] SB1835 §1 amending TBOC §1.002(23).

[35] SB1518 §15 amending TBOC §21.901(4).

[36] SB1518 §15 amending TBOC §21.901(5).

[37] SB1518 §15 amending TBOC §21.901(8).

[38] SB1518 §16 amending TBOC §21.903(a).

[39] SB1518 §16 amending TBOC §21.903(b).

[40] SB1518 §26 amending TBOC §21.913(a).

[41] *See, e.g.*., SB1518 §§18, 19, 20 amending TBOC §§21.905, 21.906 and 21.907.

[42] TBOC §§21.905 and 21.906.

[43] SB1518 §19 amending TBOC §21.906(a).

[44] SB1518 §19 amending TBOC §21.906(b)(1) [formerly (c)(1)].

[45] SB1518 §19 amending TBOC §21.906(b)(2) [formerly (c)(2)].

separate vote of each class or series of shares or of specified shareholders and that the presence or approval of shares of any class or series of which no shares are then outstanding or of any person that is no longer a shareholder is not required.[46] A new provision clarifies that holders of putative shares on the record date for determining shareholders entitled to vote at the meeting are not entitled to vote such shares or have such shares be counted for quorum purposes in any ratification vote (even though such shares will be retroactively deemed valid shares after the ratification).[47]

Several amendments clarify that although putative shares are made valid by the ratification procedure, the putative shares are not considered outstanding for voting or quorum purposes as part of the shareholder approval of the ratification.[48] This provision prevents the circular argument that the ratified putative shares should have been counted for voting or quorum purposes in the shareholder approval of the ratification.

E. Certificate of Validation.

The filing of a certificate of validation with the filing officer is required if the defective corporate act being ratified would have required the filing of a filing instrument or document with the filing officer, and an amendment clarifies no other filing instrument or documents is required to be filed.[49] SB 1518 makes substantial clarifications with respect to the contents of, and requirements for filing, a certificate of validation.[50] A separate certificate of validation is required for each defective corporate act that requires the filing of a certificate of validation, except that two or more defective corporate acts may be included in a single certificate of validation if a corporation filed or could have filed under the Code a single certificate to effect such acts.[51] A single certificate of validation may also amend the certificate of formation to cure multiple previous overissues of shares in one or more classes or series of shares by establishing a new class or series of shares or by increasing the number of authorized shares of any class or series of shares, or by establishing two or more new classes or series of shares or by increasing the number of authorized shares of two or more classes or series of shares, or a combination of the foregoing.[52] An amendment by a certificate of validation is the effective as to each class or series that is a subject of the certificate of validation as of the first overissue of the shares of the class or series.[53] Other revisions added more required information for the certificate of validation, including (a) a description and the date of each defective corporate act, (b) the number and type of putative shares and the dates on which the putative shares were purported to have been issued, (c) the nature of the failure of authorization for each defective corporate act, (d) a statement confirming the ratification of the defective corporate act and (e) the dates of the board ratification and shareholder approval, if any.[54] If the certificate of validation relates to a previously filed or a new or amended filing instrument, the previously filed or new or amended filing instrument must be attached as an exhibit to the certificate of validation and additional statements must be included in the certificate of validation.[55] The attached filing instrument does not have to be separately executed or to include any statement that the filing instrument has been approved in accordance with any other Code provision requirement.[56]

F. Notice of Ratification to Shareholders.

For each defective act ratified by the board of directors, a notice must be given to all holders of valid shares and putative shares, whether voting or nonvoting, of the adoption of the ratifying resolutions by the board of directors.[57] This notice is not required if notice of the ratification is given in accordance with procedures for shareholder approval of the ratification as required by Code Section 21.906.[58] An amendment allows the notice to shareholders about the ratification of defective corporate act by the board of directors to contain the information specified in Section 21.903(a)(1) through (5) as an alternative to providing a copy of the board resolutions.[59] In addition, the notice must contain the statement that, upon ratification of the defective corporate act or putative shares, the holder's rights to challenge the defective corporate act or putative shares will be limited to (a) an action claiming that the ratification not take effect or that it take effect only on certain conditions if the action is filed not later than 120 days after the later of the applicable validation effective time or the time at which the required notice is given, or (b) an action claiming that the ratification was not accomplished in accordance with Subchapter R. In either case, the action must be filed in a court of appropriate jurisdiction.[60] If the corporation has a class

[46] SB1518 §20 amending TBOC §21.907(c).
[47] SB1518 §20 amending TBOC §21.907(e).
[48] SB1518 §§22, 23 amending TBOC §§21.909, 21.910.
[49] SB1518 §21 amending TBOC §21.908(a).
[50] SB1518 §21 adding TBOC §21.908(a-1).
[51] SB1518 §21 adding TBOC §21.908(a-1)(1).
[52] SB1518 §21 adding TBOC §21.908(a-1)(2) and (3).
[53] SB1518 §21 adding TBOC §21.908(a-2).
[54] SB1518 §21 amending TBOC §21.908(b).
[55] *Id.*
[56] SB1518 §21 adding TBOC §21.908(c).
[57] SB1518 §25 amending TBOC §21.911(a).
[58] SB1518 §25 amending TBOC §21.911(e).
[59] SB1518 §25 amending TBOC §21.911(d)(1).
[60] SB1518 §25 amending TBOC §21.911(d)(2).

of stock listed on a national securities exchange, the required notice to shareholders will be considered given by disclosing the required information in a public filing made with the Securities and Exchange Commission pursuant to Section 13, 14 or 15(d) of the Securities Exchange Act of 1934, as amended, and the rules promulgated thereunder.[61] Another amendment clarifies that the notice given to shareholders under these provisions is treated as notice to shareholders required by Section 6.201 through 6.205 of the Code.[62] In addition, the required notice to shareholders may be included in the notice to shareholders required to be given pursuant to Section 6.202(d) of the Code, if the shareholders have approved the ratification by less-than-unanimous written consent pursuant to Section 6.202, and, if included, must be sent to shareholders entitled to notice under Section 6.202(d) and all other holders of valid shares and putative shares otherwise entitled to notice under Section 21.911(a) but need not be sent to any shareholders holder of valid shares or putative shares who has signed a consent described by Section 6.202(b).[63]

G. Court Challenge to Ratification.

SB 1518 clarifies that an action claiming that a defective corporate act or putative shares are void or voidable due to the failure of authorization may not be filed in or must be dismissed by any court after the applicable validation effective time.[64] In addition, any action claiming that a court of appropriate jurisdiction should declare that a ratification not take effect or take effect only on certain conditions may not be filed with the court after the expiration of the 120th day after the later of the validation effective time or the time any notice required under Section 21.911 is given with respect to that ratification.[65] New rules are added for determining when a notice to holders of valid shares and putative shares under Section 21.911 is considered to be given.[66]

V. ACTIONS BY BOARD OF DIRECTORS

A. Abstention by Director.

SB 1518 clarifies that a director of a domestic for-profit or non-profit corporation can record with the corporation his or her abstention with respect to an action taken at a meeting of the board of directors.[67] The prior provisions did not address abstentions and were limited to dissents to actions taken by the board of directors. A director cannot abstain if he or she voted in favor of the action.[68] Another change specifies that a director may send to the secretary of the corporation a written dissent or abstention by certified mail, return receipt requested, or by other means specified in the governing documents, in addition to sending his or her written dissent or abstention by registered mail. The dissent or abstention need only be sent within a reasonable time, instead of immediately, after the meeting has been adjourned.[69]

B. Quorum for Actions of Non-Profit Directors.

SB 1518 also clarifies that a quorum of directors of a domestic nonprofit corporation must be present at the time of the act of a majority of the directors present in person or by proxy for the action to be duly authorized.[70] That requirement was implicit in the prior language.

C. Share Issuance Flexibility.

SB 1518 amends the Code to provide more flexibility for a board of directors of a domestic for-profit corporation to authorize the issuance of shares.[71] The board's authorization for the issuance of shares may provide that shares may be issued in the manner stated in the authorization including a determination or action by any person or persons, including the corporation, if the board's authorization states the maximum number of shares to be issued, the period during which the shares may be issued and the minimum amount of consideration for which the shares may be issued.[72] Thus, the board could delegate, within the specified parameters, the authority to issue shares to a committee or an officer of the corporation. The shares may be issued in one or more transactions in the numbers and at the times as stated in or determined by the authorization.[73] These amendments are similar in concept to recent changes made to the DGCL.

In corresponding revisions, SB 1518 also makes more flexible the consideration that may be received for the issuance of shares of a domestic for-profit corporation. The amount of consideration can be approved by the board specifying a minimum amount of consideration.[74] The use of a formula for determining the consideration amount is clarified to specify that the formula may include or be made dependent on facts ascertainable outside the formula if the manner in which

[61] SB1518 §25 adding TBOC §21.911(e)(2).
[62] SB1518 §25 amending TBOC §21.911(f).
[63] SB1518 §25 adding TBOC §21.911(g).
[64] SB1518 §27 amending TBOC §21.917(b)(1).
[65] SB1518 §27 amending TBOC §21.917(b)(2).
[66] SB1518 §27 adding TBOC §21.917(c).
[67] SB1518 §§11, 30 amending TBOC §§21.404, 22.227.
[68] SB1518 §§11, 30 amending TBOC §§21.404(b), 22.227(b).
[69] SB1518 §§11, 30 amending TBOC §§21.404(a)(3), 22.227(a)(3).
[70] SB1518 §29 amending TBOC §22.214.
[71] SB1518 §6 adding TBOC §21.157(d).
[72] SB1518 §6 adding TBOC §21.157(d)(2).
[73] SB1518 §6 adding TBOC §21.157(d)(1).
[74] SB1518 §7 amending TBOC §21.160(d).

those facts operate on the formula is clearly or expressly set forth in the formula or in its authorization.[75] A similar change was made to clarify the use of formula in the context of a right or option to acquire shares.[76] These amendments are also similar in concept to recent changes in the DGCL.

D. Dividend Flexibility.

SB 1518 amends the Code to provide more flexibility for a board of directors of a domestic for-profit corporation to authorize distributions to shareholders. Under the new provision, the board may authorize a distribution by determining a maximum amount to be distributed and the period during which that maximum amount may be distributed, including by setting a formula to determine the amount to be distributed.[77] The authorization may provide that the distribution be paid in the amounts and at the times as stated in the authorization or in the manner stated in the authorization, which may include a determination or action by any person or persons, including the corporation, if the authorization states the maximum amount that may be distributed and the period during which that maximum amount may be distributed.[78]

VI. VOTING OF JOINTLY HELD OWNERSHIP INTEREST

SB 1518 adds rules for voting of jointly held ownership interests. A new phrase "jointly held ownership interest" is defined to mean an ownership interest that is held of record in the names of two or more persons, whether fiduciaries, joint tenants, tenants in common or otherwise, or an ownership interest for which two or more persons have the right to vote the interest under Code Section 6.154.[79] The jointly held ownership interest may be voted by any one of the joint record owners or by any one of the persons having the right to vote the interest under Section 6.154.[80] If more than one person votes the interest, a majority of the persons voting binds all of the record owners or persons having the right to vote the interest, but if the votes are evenly split, each faction may vote the interest proportionately.[81] These rules do not apply if the secretary or other person tabulating the votes on the entity's behalf has a good faith belief, based on received written information regarding rights or obligations with respect to voting the interest, that reliance on those rules is unwarranted.[82] These new provisions are generally consistent with provisions of the DGCL applicable to jointly owned stock.

VII. MERGER OR CONVERSION OF NONPROFIT ASSOCIATION

Domestic nonprofit associations are the only type of domestic entity that is not currently authorized under the Code to engage in a merger or conversion transaction. SB 1518 specifically authorizes a domestic nonprofit association to effect a merger or conversion by complying with the applicable provisions of Chapter 10 and the association's governing documents.[83] Another amendment adds Chapter 10 to the chapters of the Code that apply to domestic nonprofit associations.[84]

Various provisions in Chapter 10 are amended to provide that a domestic nonprofit association may engage in a merger or conversion transaction. The restrictions on a merger or conversion are the same as currently apply to a merger or conversion of domestic nonprofit corporations. A domestic nonprofit association will not be allowed to merge with a foreign for-profit entity if the nonprofit association does not continue as the surviving entity.[85] In addition, a domestic nonprofit association will not be allowed to merge into another entity if the nonprofit association would, because of the merger, lose or impair its charitable status.[86] A nonprofit association may merge into a domestic nonprofit corporation or nonprofit association or a foreign nonprofit entity, in either case that continues as the surviving entity.[87] A nonprofit association may not convert into a for-profit entity.[88]

A filing fee of $50 for filing of a certificate of merger or conversion for a domestic nonprofit association has been added and is similar to the filing fee for a merger or conversion of a nonprofit corporation.[89] In another change that parallels the fees for a nonprofit corporation, the filing of any other instrument of a nonprofit association for which the Code does not expressly provide a fee will require a fee of $5.[90]

VIII. RECORDS INSPECTION RIGHTS

A. Availability of Records of General Partnership.

SB 1517 clarifies that a domestic general partnership can make available its books and records at its chief executive office and must make available or

[75] *Id.*
[76] SB1518 §8 amending TBOC §21.168(c).
[77] SB1518 §10 adding TBOC §21.302(b).
[78] *Id.*
[79] SB1518 §3 adding TBOC §6.157(a).
[80] SB1518 §3 adding TBOC §6.157(b).
[81] SB1518 §3 adding TBOC §6.157(c) and (d).
[82] SB1518 §3 adding TBOC §6.157(e).
[83] SB1518 §34 adding TBOC §252.018.
[84] SB1518 §33 amending TBOC §252.017(b).
[85] SB1518 §4 amending TBOC §10.010(c).
[86] SB1518 §4 amending TBOC §10.010(a).
[87] SB1518 §4 amending TBOC §10.010(b) and (d).
[88] SB1518 §4 amending TBOC §10.108.
[89] SB1518 §2 amending TBOC §4.159.
[90] *Id.*

provide access to its books and records to a partner or the partner's agent or attorney.[91] The prior language of Section 152.212 could have been erroneously construed to prohibit maintenance of the partnership's books and records electronically in "the cloud" or at other locations while being accessible from its chief executive office. This change modernizes these provisions in a manner similar to the more modern records provisions for limited partnerships in Section 153.551 and for limited liability companies in Section 101.501.

B. Member's Rights to Inspection Costs from LLC.

SB 1517 adds a new provision to the Code that specifies a member of a domestic limited liability company may recover from the company the member's cost or expense, including attorneys' fees, incurred in enforcing the member's rights to examine and copy records or other information requested in writing under Section 101.502. This expense recovery is in addition to any other damages or remedy afforded to the member by law.[92] The new provision also specifies defenses to an action brought for the expense recovery. The defenses include that the person suing has improperly used information obtained through a prior examination of the records or other information of the limited liability company (or any other domestic limited liability company) or was not acting in good faith or for a proper purpose in making the person's request for examination.[93] These provisions are similar to the expense-recovery provisions in Section 21.222 of the Code for an inspecting shareholder of a domestic for-profit corporation.

C. Partner's Rights to Inspection Costs from Limited Partnership.

SB 1517 adds a new provision to the Code that specifies a partner or assignee of a partnership interest in a domestic limited partnership may recover from the partnership the partner's or assignee's cost or expense, including attorneys' fees, incurred in enforcing the partner's or assignee's rights to examine and copy records or other information requested in writing under Section 153.552. This expense recovery is in addition to any other damages or remedy afforded to the partner or assignee by law.[94] The new provision also specifies defenses to an action brought for the expense recovery. The defenses include that the person suing has improperly used information obtained through a prior examination of the records or other information of the limited partnership (or any other domestic limited partnership) or was not acting in good faith or for a proper purpose in making the person's request for examination.[95] These provisions are similar to the expense-recovery provisions in Section 21.222 of the Code for an inspecting shareholder of a domestic for-profit corporation.

D. Shareholder Inspection Rights.

SB 1518 clarifies that a shareholder of a for-profit corporation may, on written demand stating a proper purpose, examine and copy the books, records of account, minutes and share transfer records of a domestic for-profit corporation "relating to the stated purpose".[96] The prior language had an ambiguous reference to "relevant" books, records of account, minutes and share transfer records. The amendment also removes a reference indicating that the shareholder's rights under this subsection are "subject to the governing documents." This restriction is not found in the provisions for shareholder examination rights contained in the DGCL and in the Model Business Corporation Act ("*MBCA*") and could have been interpreted to allow for provisions in the certificate of formation or bylaws to restrict this key right of a shareholder.

IX. OTHER AMENDMENTS FOR PARTNERSHIPS AND LLCS

A. Involuntary Winding Up of LLCs.

SB 1517 amends the Code to specify that the grounds on which a court can order the winding up of a limited liability company are similar to the grounds on which a court can order the winding up of a partnership.[97] In addition to prior grounds, a limited liability company can be ordered to be wound up if the court determines that its economic purpose is likely to be unreasonably frustrated or one of its members has engaged in conduct relating to the entity's business that makes it not reasonably practicable to carry on the business with that member.[98] The prior grounds on which a court may order the winding up of a limited liability company could be interpreted to include the additional grounds specified for a partnership, but the amendment makes these additional grounds explicit.

B. Enforceability of Partnership Agreement and Company Agreement.

SB 1517 clarifies that a company agreement of a domestic limited liability company is enforceable by and against the limited liability company regardless of whether the company itself has signed or otherwise

[91] SB1517 §14 amending TBOC §152.212(b) and (c).
[92] SB1517 §11 adding TBOC §101.503(a).
[93] SB1517 §11 adding TBOC §101.503(b).
[94] SB1517 §15 adding TBOC §153.5521(a).
[95] SB1517 §15 adding TBOC §153.5521(b).
[96] SB1518 §9 amending TBOC §21.218(b).
[97] SB1517 §7 amending TBOC §11.314.
[98] SB1517 §7 amending TBOC §11.314(1).

expressly adopted the company agreement.[99] A similar change also clarifies that a partnership agreement of a domestic general or limited partnership is enforceable by or against the partnership regardless of whether the partnership itself has signed or otherwise expressly adopted the partnership agreement.[100] These results are implicit in the existing language of the Code.

C. Notice to Non-Consenting Partners of Action by Written Consent.

SB 1517 rescinds Section 154.013 of the Code.[101] That section required that prompt notice of the taking of any action by the consent of fewer than all of the partners in a domestic partnership must be given to a partner who has not given written consent to the action. This provision is rarely observed in practice and often constitutes a trap for legal practitioners and partnerships. Similar provisions are not contained in the Delaware partnership laws and the partnership laws of most other states.

D. Oral Partnership Agreements.

SB 1517 removes the implication that only a written, as opposed to an oral, partnership agreement may establish or provide for the future creation of additional classes or groups of partners[102] and can contain provisions relating to the process for voting for a partner.[103]

X. OTHER AMENDMENTS FOR CORPORATIONS

A. Class Voting of Shares for Merger or Conversion.

SB 1518 clarifies that separate voting by a class or series of shares of a domestic for-profit corporation is required for approval of a plan of merger or conversion if that class or series of shares is to be converted into or exchanged for other securities, interests, obligations, rights to acquire shares, interests, or other securities, cash, property or any combination of the foregoing as a result of the merger or conversion.[104] A similar result is reached under existing Code provisions although a somewhat tortured analysis is required because the existing provisions are indirect in their application.

B. Period of Duration of Old Corporations.

New provisions are added to the transition provisions of the Code to clarify the period of duration of certain old domestic for-profit and nonprofit corporations.[105] These provisions are similar to what was contained in Article 2.02(A)(1) of the Texas Business Corporation Act ("*TBCA*") and Article 1396-2.02(A)(1) of the Texas Nonprofit Corporation Act ("*TNPCA*"). Business corporations formed under Texas statutes in effect before the adoption of the TBCA, which became effective September 6, 1955, had a maximum life of 50 years under such prior Texas law. Nonprofit corporations formed under prior Texas statutes in effect before the adoption of the TNPCA, which became effective August 10, 1959, had a maximum life of 50 years under such prior Texas law. With the adoption of the TBCA and TNPCA, corporations could have a perpetual duration. The prior transition provisions in the TBCA and TNPCA provided that these corporations would have a perpetual duration on May 2, 1979, unless they amended their articles of incorporation thereafter to specify a finite period of duration. The Code had omitted these transition provisions in the belief that they were outdated, but issues have arisen in relation to some of these old corporations that have continued in existence in reliance on those transition provisions in the TBCA or TNPCA. Those transition provisions superseded provisions in the articles of incorporation of these old corporations that specified finite periods of duration originally derived from the Texas statutes under which they were formed. The new provisions added to the Code restore the overriding perpetual period of duration rule for these old corporations.

XI. MAILING OF VARIOUS NOTICES

SB 1518 amends several provisions of the Code to make them consistent in their requirements for the sending of various kinds of demands, dissents or requests by owners or members. As a result of this rationalization, the demand, request or dissent may be sent in a consistent manner via certified or registered mail, return receipt requested, or by other means specified in the governing documents of the entity. These amendments apply to: (a) written dissent of a shareholder of a close corporation to the secretary of the corporation;[106] (b) demand from a member of a nonprofit corporation to an officer of the corporation;[107] (c) a written request by a shareholder of a real estate investment trust to an officer or trust manager of the real estate investment trust;[108] and (d) a written notice to the secretary of a for-profit or nonprofit corporation of a written dissent or abstention by a director.[109]

On the other hand, another amendment removes the requirement that a notice of a required report of a

[99] SB1517 §8 adding TBOC §101.052(f).
[100] SB1517 §18 adding TBOC §154.105.
[101] SB1517 §19
[102] SB1517 §16 amending TBOC §154.101(a).
[103] SB1517 §17 amending TBOC §154.102.
[104] SB1518 §12 amending TBOC §21.458(a).
[105] SB1518 §35 adding TBOC §402.015.
[106] SB1518 §14 amending TBOC §21.729(c).
[107] SB1518 §28 amending TBOC §22.154(a).
[108] SB1518 §31 amending TBOC §200.251.
[109] SB1518 §§11, 30 amending TBOC §§21.404(a)(3), 22.227(a)(3).

domestic cooperative association must be sent by the Secretary of State or a member of the association to the association must be sent by registered mail.[110] The registered mail requirement is not contained in similar notice provisions applicable to other types of entities.

[110] SB1518 §32 amending TBOC §251.354.

AN INTRODUCTION TO THE TEXAS BUSINESS LAW FOUNDATION

The Texas Business Law Foundation (the "*Foundation*") is a non-profit corporation organized in 1988 and supported by businesses, law firms, professors of business law and individuals throughout Texas. The Foundation's objective is to promote a favorable business climate in Texas through the maintenance of a modern system of business laws. To achieve this goal, the Foundation sponsors Texas legislation that advances the law and solves problems, monitors state legislative and administrative proposals of interest to Foundation members, endorses or opposes those proposals and serves as a source of advice and consultation to the legislative, judicial and executive branches of Texas government.

Whether sponsoring a uniform state business statute or a modernization of usury and organizational laws, the Foundation can be relied on to provide a package of progressive and sound business law legislation at each biennial session of the Texas Legislature. The Foundation has also been vigilant in monitoring bills that are adverse to the interests of business in Texas and in mobilizing opposition where appropriate. Among the proposed laws successfully opposed by the Foundation were those that would regulate the compensation of management, impose at a state level regulations similar to but beyond those in the Sarbanes-Oxley Act of 2002, and void certain indemnification arrangements. Your contribution to the Foundation assures your firm or company a voice in the future direction of Texas business law and the chance to participate in promoting an environment that is advantageous to your company or clients.

In supporting or opposing legislation, the Foundation has both acted as the primary advocate or opponent and partnered with or provided support to other like-minded organizations in its effort to achieve the desired outcome. The Foundation avoids active sponsorship of legislation that is not viewed favorably by its members or that is more high profile and controversial (for example, tort reform). In addition to its legislative efforts, the Foundation has drafted and filed amicus briefs and position papers with the courts and regulatory bodies in support of or opposition to litigation, regulation or legislation.

The directors of the Foundation are lawyers in private practice, general counsels of major corporations, and distinguished professors of law and corporate executives who concentrate on governmental relations and public affairs. The current officers of the Foundation and their affiliations are as follows:

Chairman: Richard A. Tulli, Gardere Wynne Sewell LLP, Dallas
Chairman Elect: Michael W. Tankersley, Alston & Bird LLP, Dallas
Vice Chairman: F. John Podvin, Jr., Shapiro Bieging Barber Otteson LLP, Dallas
Secretary-Treasurer: Rick Jordan, Gardere Wynne Sewell LLP, Dallas
Immediate Past Chairman: Scott G. Night, Haynes and Boone LLP, Dallas

The Foundation's Sustaining and Contributing Members include:

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For further information regarding the purposes, history and successes of the Foundation, *see Alan R. Bromberg, Byron F. Egan, Dan L. Nicewander and Robert S. Trotti, "The Role of the Business Law Section and the Texas Business Law Foundation in the Development of Texas Business Law,"* 41 Texas Journal of Business Law 41 (Spring 2005), available at http://www.jw.com/site/jsp/publicationinfo.jsp?id=1239.

For more information on how to join the Foundation and to assist in its efforts, please contact:

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LEGISLATION SPONSORED BY TEXAS BUSINESS LAW FOUNDATION
85th TEXAS LEGISLATURE (2017)

Sponsored Bills

The Foundation is now engaged in sponsoring the following bills in the 85th Texas Legislature, which has recently begun its work:

1. Updating Corporate and Nonprofit Association Statutes. The Foundation is sponsoring a bill to amend the Texas Business Organizations Code ("*TBOC*") to provide substantive and technical amendments primarily affecting corporations and nonprofit associations. The bill, which the Business Law Section Business Organizations Code Drafting Committee developed, currently includes the following substantive amendments: (a) authorizing merger and conversion transactions for nonprofit associations subject to restrictions similar to those existing for nonprofit corporations, (b) providing more flexibility to a for-profit corporation's board of directors to delegate its authority to approve the issuance of shares, including the use of a formula, a maximum number of shares and minimum consideration for issuance of shares, (c) providing more flexibility to a for-profit corporation's board of directors to delegate its authority to approve the payment of dividends on shares, including the use of a formula, a maximum amount of dividends and a maximum time period for the dividends, (d) adding rules for voting of jointly held ownership interests, and (e) permitting a notice of a board's ratification of a defective corporate act to shareholders of a corporation whose shares are listed in a national securities exchange to be given by disclosure in a public filing with the Securities and Exchange Commission. The bill is in the process of being filed in the Legislature.

2. Updating Partnership and Limited Liability Company Statutes. The Foundation is also sponsoring a bill to amend the TBOC to provide substantive and technical amendments primarily affecting partnerships and limited liability companies. The bill, which the Business Law Section Business Organizations Code Drafting Committee developed, currently includes the following substantive amendments: (a) adding service of process rules for series of a limited liability company or foreign organization, (b) revising the grounds on which a court can order the winding up of a limited liability company to be similar to those for a partnership, (c) specifying as a default rule that a vacancy in the position of a manager of a limited liability company can be filled by the company's members, and (d) removing a requirement that a partnership must give non-consenting partners a notice of any action taken by less than unanimous partner consent. The bill is in the process of being filed in the Legislature.

3. Updating Texas Uniform Trade Secrets Act. The Foundation is also sponsoring a bill to amend the Texas Uniform Trade Secrets Act ("*TUTSA*") to more closely conform the TUTSA to the federal Defend Trade Secrets Act ("*DTSA*"), which was passed by the United States Congress in May 2016 and created a civil cause of action for misappropriation of trade secrets. The bill currently includes the following amendments: (a) aligning the definitions of "misappropriation" and "trade secret" with the definitions of those terms in the DTSA, and adding a definition of "owner" that is similar to that in the DTSA, (b) conforming the definition of "clear and convincing" with the definition in the Texas Civil Practice and Remedies Code, and conforming the definition of "willful and malicious" with that used in a federal appellate court decision applying another state's Uniform Trade Secrets Act, (c) incorporating in the TUTSA the common-law rule (decided under the TUTSA) that an employee cannot be enjoined "from using general knowledge, skill, and experience … acquired during employment," (d) adding a provision to the TUTSA to ensure that

Rule 76a of the Texas Rules of Civil Procedure does not apply to actions under the TUTSA, and (e) incorporating in the TUTSA the Texas Supreme Court's balancing test for excluding a party from participating in a proceeding or an action under the TUTSA.

4. Entity or Business Names. The Foundation is also sponsoring a bill to amend the TBOC regarding the standard for entity names in Texas that is applied by the Texas Secretary of State. The bill, which the Business Law Section Business Organizations Code Drafting Committee developed and which is supported by the Texas Secretary of State, adopts the standard that an entity name be "distinguishable in the records" of the Secretary of State from an existing entity name, rather than the current standard that an entity name not be the "same" as, or (as determined by the Secretary of State) "deceptively similar" or "similar" to, an existing entity name. The Foundation understands that the "distinguishable" names standard is more uniform or consistent with the standard applied in a majority of other states and should facilitate the formation of new entities in Texas and expedite the registration of foreign entities in Texas, because there should be fewer rejections of applications to reserve, register, or use entity names (including assumed names) in Texas.

LEGISLATION SPONSORED BY TEXAS BUSINESS LAW FOUNDATION 84th TEXAS LEGISLATURE (2015)

Sponsored Bills

The Foundation sponsored and shepherded the following bills through the 84th Texas Legislature, which adjourned on June 1, 2015, from their introduction through their passage:

1. Updating Corporate Statutes. S.B. 860 amended the TBOC to provide substantive and technical amendments affecting corporations and fundamental business transactions. These amendments include, among other changes, provisions: (a) authorizing the acquisition of a Texas public for-profit corporation through a "two-step" tender offer and merger process; (b) clarifying that an owner or member of a domestic entity cannot become subject to liability as a result of a merger, conversion or interest exchange transaction without the consent of that owner or member; (c) clarifying that a formula can be used to determine the manner and basis of converting ownership interests in a merger, exchange or conversion transaction; (d) clarifying that ownership interests of an entity that is a party to a merger can remain outstanding rather than being converted or exchanged as part of the merger if the entity survives the merger; (e) clarifying that a for-profit corporation, real estate investment trust or professional corporation may issue and have outstanding both certificated and uncertificated ownership interests of the same class or series; and (f) removes the antiquated ten-year time limit on the valid duration of shareholders' agreements, subject to grandfathering of pre-existing agreements. The Business Law Section Business Organizations Code Drafting Committee developed the bill.

2. Updating Partnership Statutes. S.B. 859 made substantive and technical amendments to the TBOC affecting partnerships and limited liabilities companies. These amendments include, among other things, provisions: (a) eliminating the antiquated requirements for a limited liability partnership ("*LLP*") to file an annual renewal of registration and, to mitigate potential liability problems arising from minor compliance errors, the bill clarifies that the acceptance by the Secretary of State of an application for registration is conclusive evidence of the satisfaction of all

conditions precedent to an effective registration and that the registration remains effective so long as there is substantial compliance with the registration and annual reporting requirements; and (b) clarifying the enforceability of irrevocable power-of-attorney provisions for a limited liability company, general partnership or limited partnership. The Business Law Section Business Organizations Code Drafting Committee also developed the bill.

3. Texas Business & Commerce Code. S.B. 1077 eliminated an ambiguity in the Texas Business & Commerce Code ("*TBCC*") by modifying the definition of a "person" to include a series limited liability company. This change confirms that a series of a Texas limited liability company or a series of a foreign for-profit entity can independently engage in the sale and lease of goods and other transactions that are subject to the Texas Uniform Commercial Code as contained in the TBCC.

Chancery or Business Courts Bill

The Foundation actively supported and worked closely with Representative Jason Villalba on H.B. 1603 which would have created a chancery-court or business-court system in Texas to handle specific business litigation. The bill encountered strong opposition from, among other constituencies, the Texas Trial Lawyers Association, American Board of Trial Advocates, the Texas Association of Defense Counsel and some members of the judiciary. Although the Chancery Court bill did not pass in the session, Representative Villalba, with the support of the Foundation, is continuing to champion the initiative in the 2017 legislative session.

Other Bills

The Foundation also contributed to changes in the course or content of, or the demise of, several bills that were introduced by others in the session and affected statutes that have traditionally been of interest to the Foundation, including:

1. Shareholder Oppression. H.B. 3168 would have amended Chapter 21 of the TBOC to provide remedies for shareholder oppression in closely held corporations, apparently overturning the Texas Supreme Court's decision in *Ritchie v. Rupe*. Representative Villalba, the Foundation lobby team and Byron Egan met with Representative Simmons, the bill's sponsor, and Representative Rinaldi to discuss concerns, after which Representative Simmons did not move forward with the bill. The Foundation does not know if Representative Simmons will re-introduce the bill in the 2017 legislative session, but if he does so, the Foundation and its lobby team will continue to actively oppose such legislation.

2. Human Trafficking. H.B. 968 made a shareholder or member of an certain entities under the TBOC jointly liable under Section 98.002 of the Civil Practices and Remedies Code for damages arising from trafficking of a person if the shareholder or member caused or had knowledge of the entity to be used for trafficking for the direct personal benefit of the shareholder or member. The bill was modeled after TBCC Section 21.223(b) regarding existing lawsuit liability for shareholders in fraud cases. The bill's sponsors accepted language proposed by the Foundation in a committee substitute to better mirror existing state law.

3. Power of Attorney. H.B. 3095, which was supported by Real Estate, Probate and Trust Law Section, would have made changes to the Probate Code with respect to powers of attorney including provisions mandating acceptance of a durable power of attorney. The Foundation and

the Business Law Section had numerous concerns with the bill including (a) that mandatory acceptance would conflict with provisions in business entity organizational documents, and (b) the lack of a limitation on the format of the power of attorney. A working group of the Foundation and the Business Law Section worked with members of the REPTL Section and other stakeholders to address concerns and a favorable committee substitute was developed, which ultimately did not pass. The REPTL Section is working to pass similar legislation in the 2017 legislative session, and the Foundation is working to continue to make sure the Foundation's and Business Law Section's concerns are addressed.

LEGISLATION SPONSORED BY TEXAS BUSINESS LAW FOUNDATION 83rd TEXAS LEGISLATURE (2013)

The Foundation sponsored and shepherded the following bills through the 83rd Texas Legislature, which commenced January 11, 2013 and adjourned on May 27, 2013, from their introduction through their passage:

1. Updating Corporate Statutes. S.B. 847 by Sen. John J. Carona amended the TBOC to update its provisions relating to corporations, partnerships and LLCs, including (i) simplification of the required contents for amended and restated certificates of formation, (ii) requiring limited partnerships to give winding up notices to potential claimants much like corporations are currently required to do, (iii) clarifying that the governing documents of partnerships and LLCs may eliminate monetary liability of their governing persons to the same extent that a corporate certificate of formation can do so for directors and to the further extent permitted by the specific partnership and LLC provisions of the TBOC, (iv) clarification that partnership agreements and LLC company agreements may provide rights to persons who are not parties thereto (e.g., officers, managers or creditors), and (v) clarification of the powers of an LLC series and that a series is not a separate entity. S.B. 847 also amended Section 24.003 of the Texas Business and Commerce Code ("*TB&CC*") to eliminate a subsection that provided that a general partner's nonpartnership assets are considered in determining the solvency of the partnership for fraudulent transfer purposes. Available at:

http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB847.

2. Social Purposes in For-Profit Corporations. S.B. 849 by Sen. John J. Carona amended the TBOC to allow for-profit corporations to include "social purposes" in their certificates of formation and to specify that their governing persons are entitled to consider those social purposes in making decisions on behalf of the corporations. Available at:

http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB849.

3. Finance Code. H.B. 1979 by Rep. Mike Villarreal amended Section 306.003 of the Finance Code to allow parties to commercial loans to agree that (i) interest is to be computed on the basis of actual days over a year of 360 days or twelve 30-day months and (ii) accrued interest may be paid on a periodic basis (not more often than monthly) by adding it to the principal balance of the loan. H.B. 1979 also confirmed that the provisions in Chapter 306 are meant to be safe harbors and do not create a negative implication for other transactions. Available at:

http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB1979.

4. Amendments to Section 4A.108, Texas Business & Commerce Code. S.B. 230 by Sen. John J. Carona amended TB&CC Section 4A.108 so that international consumer wire transfers will remain covered by TB&CC Section 4A.108. The amendment was necessitated by an amendment to the federal Electronic Funds Transfer Act effected by the Dodd-Frank Wall Street Reform and Consumer Protection Act that would have removed the statutory framework for such transfers. Available at:
http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB230.

5. Amendments to Section 9.516(b), Texas Business & Commerce Code. SB 474 by Sen. John J. Carona amended TB&CC Section 9.516(b) to eliminate organization information from financing statements that is not otherwise required by the TB&CC. Available at:

http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB474.

6. Uniform Trade Secrets Act. SB 953 by Sen. John J. Carona enacted the Uniform Trade Secrets Act ("*UTSA*") to generally modernize existing Texas common law relating to misappropriation of trade secrets, but made the following changes from the UTSA: (i) does not require that information have been in "continuous use", resulting in a broader class of trade secrets, (ii) provides that injunctive relief is a proper remedy, (iii) provides that attorneys' fees are available to a plaintiff where misappropriation was willful and malicious, and are available to a defendant where a claim of misappropriation was made in bad faith, and (iv) provides that damages for misappropriation can include both actual loss and unjust enrichment, or alternatively imposition of a reasonable royalty, plus exemplary damages not exceeding twice any damage award. The UTSA has been adopted in 46 other states. Available at:

http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB953.

We also contributed to changes in the course or content of, or the demise of, several bills that were introduced by others in the Regular Session and affected statutes that have traditionally been of interest to the Foundation, including:

(i) Assumed Name Filings. Chapter 71 of the TB&CC requires a filing entity to file an assumed name certificate if it conducts business in Texas in a name other than the one in its certificate of formation on file with the Secretary of State and include certain information. S.B 699 by Sen. John J. Carona at the request of the Secretary of State amended TB&CC Section 71.102 to eliminate the requirement that an assumed name certificate include the entity's registered office (as it is already in another filing with the Secretary of State) and simplified the information required in connection with a principal office. Available at:

http://www.legis.state.tx.us/BillLookup/history.aspx?LegSess=83R&Bill=SB699.

(ii) Series LLC Name Filing. H.B. 1624 by Rep. Philip Cortez was initially proposed as an amendment to TBOC Section 101.601 adding a requirement that an LLC establishing a series shall name the series with a name that contained the name of the LLC followed by the word "series" and a unique identifying number. The bill was reworked into a simple amendment to the TB&CC Section 71.002(2) to require an assumed name filing for an LLC series established by its company agreement. H.B. 1624 as passed did not contain any requirements as to the naming of any series. Available at:

http://www.legis.state.tx.us/BillLookup/history.aspx?LegSess=83R&Bill=HB1624.

(iii) Powers of Attorney. H.B. 2918 by Rep. Senfronia Thompson, as passed and effective January 1, 2014, changed the current statutory durable power of attorney form in Estates Codes Section 752.051 from an "opt-out" form to an "opt-in" form (i.e. from a form in which powers are granted unless expressly excluded to one in which powers are not granted unless affirmatively so provided) and added wording regarding the fiduciary duties and other legal responsibilities of an agent appointed pursuant to a statutory durable power of attorney. Foundation representatives monitored the bill so that it did not end up containing provisions that would have applied to powers of attorney in entity organization and governance documents, financing documents and other commercial documents. Available at:

http://www.legis.state.tx.us/BillLookup/history.aspx?LegSess=83R&Bill=HB2918.

(iv) Banks. S.B. 804 by Sen. John J. Carona revised provisions in certain laws governing certain banks and trust companies in Texas to conform to changes in terminology made by the TBOC. This legislation was prepared by the Department of Banking and primarily substitutes the term "certificate of formation" for the term "articles of association." Available at:

http://www.legis.state.tx.us/BillLookup/history.aspx?LegSess=83R&Bill=SB804.

(v) Bank Regulation. H.B. 1664 by Rep. Mike Villarreal amended provisions of the Finance Code relating to the subpoena and other regulatory powers of state bank and trust company regulators, the opening of state bank deposit or loan production offices, limitations on the providing by a state bank or trust company of confidential information to its advisory directors, meetings of the board of directors of a state bank, holding real estate and mineral royalty interests, and other matters relating to the regulation of state banks, trust companies and bank holding companies. Available at:

http://www.legis.state.tx.us/BillLookup/history.aspx?LegSess=83R&Bill=HB1664.

LEGISLATION SPONSORED BY TEXAS BUSINESS LAW FOUNDATION
82nd TEXAS LEGISLATURE (2011)

The Foundation sponsored and shepherded the following bills through the 82nd Texas Legislature, which convened on January 11, 2011 and adjourned on May 30, 2011, from their introduction through their passage:

1. LLC Veil Piercing Limits. Senate Bill 323 amended the TBOC to provide that the TBOC provisions limiting the liability of shareholders of Texas corporations apply equally to managers and members of Texas limited liability companies ("LLCs") if or to the extent LLC veil piercing becomes recognized in Texas. SB 323 is available at:

http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB521.

2. Derivative Plaintiff Qualification. Senate Bill 1568 deleted a TBOC provision that was ambiguous and inconsistent with other TBOC provisions and court holdings relating to standing to bring a derivative action on behalf of a corporation after a merger. Now it is clear that a derivative plaintiff must own stock at the time of the act complained of and continuously to the completion of the lawsuit. SB 1568 is available at:

http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB1568.

3. Business Entity Statute Updating. Senate Bill 748 is a 58-page package of amendments to the corporation, non-profit corporation, partnership and LLC provisions of the TBOC that addresses issues that have arisen in recent experience under the TBOC and makes the statute more user friendly for Texas entities. SB 748 is available at:

http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB748.

4. More Flexibility to Choose Law Applicable to Large Transactions. House Bill 2991 amended Chapter 271 of the Texas Business and Commerce Code to add additional flexibility in choosing the law of a particular jurisdiction to govern large business transactions. HB 2991 is available at:

http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB2991.

5. Secured Transactions. Senate Bill 782 amended Texas Business and Commerce Code Chapter 9 to adopt changes approved and recommended by the National Conference of Commissioners on Uniform State Laws for enactment in all states. The majority of the changes are for enhanced clarity or to reflect advances in technology or changes in business practice. SB 782 is available at:

http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB782.

In 2011 the Foundation also successfully opposed proposed legislation that, if enacted, would have been generally unfavorable to the conduct of business. Among the bills the Foundation opposed in 2011 that did not pass were bills restricting the choice of foreign law and adding requirements for powers of attorney that could affect commercial transactions.

OTHER LEGISLATION SPONSORED BY TEXAS BUSINESS LAW FOUNDATION

During its history, the Foundation has been extremely successful in obtaining the passage of its legislative program by the Texas Legislature. Most of the laws that the Foundation has sponsored and passed are listed below:

Amendments to Texas Business Corporation Act in 1985, 1989, 1991, 1993, 1995, 1997, 2003 and 2005

Revised Limited Partnership Act of Texas in 1991, and amendments in 1993, 1995, 1997, 2003 and 2005

Revised Partnership Act of Texas, and amendments in 2003 and 2005

Limited Liability Partnership Amendments to Uniform Partnership Act and to Revised Partnership Act of Texas

Limited Liability Company Act of Texas in 1991, amendments in 1993, 1995, 1997, 2003, 2005, and 2007

Business and Commerce Code Amendments (i.e., Revised UCC Articles 1, 2A, 3, 4, 4A, 5, 6, 7, 8 and 9) in 1991, 1995, 1997, 1999, 2003 and 2005, technical amendments to UCC Article 9 in 2001, 2003, and 2007, and amendments to UCC Articles 3 and 4 in 2005

Uniform Unincorporated Non-Profit Association Act in 1995

Amendments to Non-Profit Corporation Act in 1993 and 1995

Texas Environmental and Safety and Health Audit Privilege Act in 1995

Amendments to Real Estate Investment Trust Act in 1995 and 1997

Contractual Choice of Law in 1993

Covenants Not to Compete Amendments in 1989, 1991 and 1993

Professional Service Negligence Bill in 1995

Usury Reform Amendments in 1993, 1997, 1999 and 2005

Contractual Choice of Venue Bill in 1999
Euro Conversion Bill in 1999

Uniform Electronic Transactions Act in 2001

Texas Business Organizations Code in 2003, and amendments thereto in 2005, 2007 and 2009.

Anti-Botnet Bill in 2009

Amendments to Certificate of Title Statutes in 2009

In addition, the Foundation has in each legislative session monitored and either endorsed or opposed any number of other bills, all from the standpoint of their benefit to the conduct of business in the State of Texas. The Foundation's efforts have also resulted in the modification of legislation to reduce its negative effect on business.