ENTITY ACQUISITIONS UNDER THE TEXAS BUSINESS ORGANIZATIONS CODE, INCLUDING THE 2015 AMENDMENTS

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I. INTRODUCTION TO CODE

The Texas Business Organizations Code (the TBOC or the Code) is a substantive codification of the prior Texas statutes governing non-profit and for-profit private-sector entities, which, for the most part, were repealed effective as of January 1, 2010. These 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 existing provisions of Texas statutes governing private entities.

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 has been 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.

The Committee's continuing work to improve the Code has resulted in amendments to the Code effective September 1, 2015 that, as relevant, are briefly described below in this article.

II. GENERAL STRUCTURE OF 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

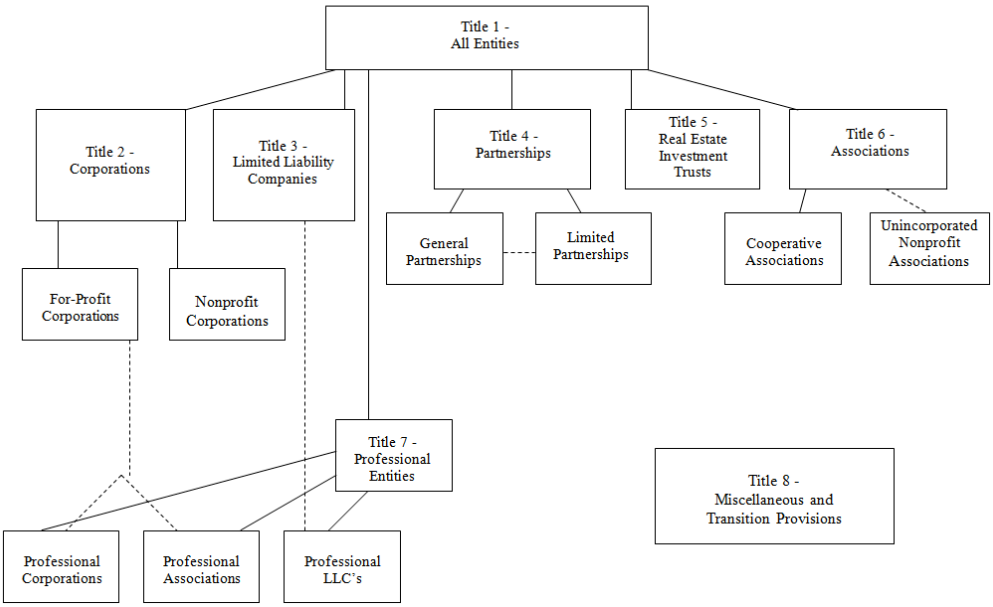
Title 7 Professional Entities

Title 8 Miscellaneous and Transition Provisions

This article focuses on those provisions in the Code that apply to mergers, conversions, interest exchanges and sales of assets by domestic entities. The bulk of those kinds of provisions are found in Title 1 General Provisions. Some provisions can also be found in each of Titles 2 through 7, but those provisions generally relate only to the requirements for domestic entities to approve one of these kinds of transactions.

A structure chart that illustrates the organization of the Titles of the Code can be found on the following page.

BUSINESS ORGANIZATIONS CODE STRUCTURE



III. TITLE 1

Title 1 contains the common provisions that generally apply to most types of entities. The Chapters of "Title 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

The primary provisions in the Code that apply to mergers, conversions, interest exchanges and sales of assets by domestic entities can be found in Chapter 1 Definitions and Other Provisions and in Chapter 10 Mergers, Exchanges, Conversions and Sales of Assets. Other less directly applicable provisions can be found in Chapter 3 Formation and Governance, Chapter 4 Filings and Chapter 6 Meetings and Voting.

IV. 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 of entities or organizations, 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.[2]

2. "*Non-code organization*" — an organization other than a domestic entity.[3] The term essentially includes either a foreign entity or an organization formed under a Texas law other than the Code, such as banks and insurance companies.

3. "*Entity*" — either a domestic entity or a foreign entity.[4]

(A) "*Domestic entity*" — an organization formed under or the internal affairs of which are governed by the Code.[5]

(i) "*Filing entity*" — a domestic corporation, limited partnership, limited liability company, professional association, cooperative or real estate investment trust.[6] These domestic entities require a filing with the Secretary of State or a county clerk's office as a condition to formation. The term does not include a general partnership that is 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.[7] This type of entity does not require a formal filing as a condition to formation. Included in the term are general partnerships[8] and non-profit associations.[9]

(B) "*Foreign entity*" — an organization formed under and whose internal affairs are governed by the laws of a jurisdiction other than Texas.[10]

(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.[11]

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[2] TEX. BUS. ORGS. CODE ANN. § 1.002(62) (West 2015).

[3] *Id*. at (56).

[4] *Id*. at (21).

[5] *Id*. at (18).

[6] *Id*. at (22).

[7] *Id*. at (57).

[8] 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 by filing with the Secretary of State. *See id*. § 152.802(a). Subchapter J of the Code was amended effective January 1, 2016 by Senate Bill 859, passed by the 2015 Texas Legislature, to require domestic limited liability partnerships to file annual reports with the Texas Secretary of State instead of requiring them to file annual renewals of registration.

[9] *Id.* § 1.002(57).

[10] *Id*. at (28).

[11] *Id*. at (29). The specific exclusion of foreign limited liability partnerships from the definition of the term "foreign filing entity" prevents the anomalous result of treating foreign limited liability partnerships as filing entities while treating domestic limited liability partnerships as non-filing entities.

(ii) "*Foreign nonfiling entity*" — a foreign entity that is not a foreign filing entity.[12]

(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.[13]

(D) "*For-profit entity*" — an entity other than a non-profit entity.[14]

(E) "*Professional entity*" — Chapter 1 incorporates this definition from Chapter 301.[15] It means a "*professional association,*" "*professional corporation*" or "*professional limited liability company*."[16] 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.[17] The term "professional entity" does not include a general partnership or limited liability partnership providing professional services.

Each entity has either "*owners*"[18] or "*members*"[19] which in turn correspond to "*ownership interests*"[20] or "*membership interests*,"[21] 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 domestic "*filing entity*" is formed by filing a "*certificate of formation*,"[22] which replaces the articles of incorporation, articles of organization, certificate of limited partnership or similar document as used in the prior statutes. The term "*organizer*" is used in Chapter 3 in

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[12] *Id*. at (31).

[13] *Id*. at (60).

[14] *Id.* at (26). Section 3.007(d) of the Code provides that a for-profit corporation may include in its certificate of formation one or more social purposes in addition to the purpose or purposes required to be stated in its certificate of formation. *Id.* § 3.007(d). The term "social purposes" is defined in Section 1.002(82-a). *Id.* § 1.002(82-a).

[15] § 1.002(73).

[16] *Id*. § 301.003(4).

[17] *Id*. at (2), (3), (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. *Id*. at (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. *Id*. at (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. *Id*. at (1).

[18] *Id*. § 1.002(63).

[19] *Id*. at (53).

[20] *Id*. at (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.

[21] *Id*. at (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.

[22] *Id*. at (6).

place of "*incorporator*." The organizer must sign the certificate of formation.[23] 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 domestic entity. Similarly, for a foreign entity, the instruments, documents and agreements that govern its formation or internal affairs constitute its "*governing documents*."[24]

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*."[25]

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*."[26] 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.[27] A "*managerial official*" is:

(a) an officer, or

(b) a governing person.[28]

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

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[23] *Id.* § 3.004.

[24] *Id.* § 1.002(36).

[25] *Id.* at (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. *Id.* at (24).

[26] *Id.* at (35). The term "governing authority" does not include an officer who is acting in the capacity of an officer. *Id.*

[27] *Id*. at (37).

[28] *Id.* at (52).

governing documents.[29]

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.[30] 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.[31] The term "*electronic transmission*" 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.[32]

V. KEY DEFINITIONS FOR FUNDAMENTAL BUSINESS TRANSACTIONS

The term "*fundamental business transaction*" means a merger, interest exchange, conversion, or sale of all or substantially all of an entity's assets.[33] The term "*interest exchange*" is similar to the term "*share exchange*" as was used in the TBCA, but applies to exchanges of membership or ownership interests in all domestic entities.[34]

"*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.[35]

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 collectively to 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.[36] 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.*"[37] 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

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[29] *Id.* at (61).

[30] *Id.* at (82).

[31] *Id.* at (89).

[32] *Id.* at (20-a).

[33] *Id.* at (32).

[34] *Id.* at (41).

[35] *Id.* §§ 10.151, 10.154.

[36] *Id.* §§ 21.364, 22.164, 200.261.

[37] *Id.* § 22.164.

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.[38]

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.[39] 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.[40] The definition of "*conversion*" also has 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.[41]

The term "*converted entity*" means an entity resulting from a conversion. The term "*converting entity*" means an entity as the entity existed before the entity's conversion.[42] A "*non-United States entity*" is defined as 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.[43]

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38 *Id.* § 1.002(43).

39 *Id.* at (55).

40 *Id.* at (10).

41 *Id.*

42 *Id.* at (11) and (12).

43 *Id.* at (56a) and (56b).

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.[44]

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.[45]

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.[46] The most detailed definitions of that phrase are located in the chapters governing for-profit corporations and real estate investment trusts.[47] 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.[48] The phrase 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.[49]

Not all domestic entities provide to its owners the rights of dissent and appraisal in connection with a fundamental business transaction.[50] 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 dissenters' rights*."[51] 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.[52] Domestic limited liability companies and limited partnerships may elect to provide their owners such rights.[53]

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[44] *Id.* at (41).

[45] *Id.* at (69).

[46] *Id.* §§ 21.451(2), 22.252(h), 200.401(2).

[47] *Id.* §§ 21.451(2), 200.401(2).

[48] *Id.* § 21.451(2).

[49] *Id*. Because of this definition, shareholder approval may not be required regarding a sale of assets by a domestic for-profit corporation when it would be required for a similar sale by a foreign (e.g., Delaware) corporation under its governing law.

[50] *Id.* § 10.351(b).

[51] *Id*. § 1.002(19).

[52] *Id*. § 10.351(b).

[53] *Id*.

The terms "*plan of merger*," "*plan of exchange,*" and "*plan of conversion,*" which are used extensively in Chapter 10 and elsewhere in the Code, simply mean a document that conforms with the requirements applicable to the type of plan in particular sections of Chapter 10, without specifying any particular format.[54] Amendments to Chapter 10 in 2015 clarified that a plan of merger, a plan of exchange and a plan of conversion need not be signed, but must only be in writing and adopted or approved as required by the Code.[55]

VI. SUMMARY OF CHAPTER 10 GOVERNING FUNDAMENTAL BUSINESS TRANSACTIONS

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.[56]

Subchapter A sets forth the rules for adoption of plans of merger,[57] contents of plans of merger,[58] and effects of a merger.[59] Special provisions are also contained in Subchapter A relating to partnership mergers,[60] non-profit corporation mergers,[61] short-form mergers,[62] and mergers creating holding companies.[63] Section 10.005, governing mergers creating holding companies, does not apply to partnerships.[64] Section 10.006, governing short-form mergers, does not apply if a subsidiary organization that is a party to the merger is a partnership.[65]

Section 10.009 contains a number of special provisions relating to mergers of partnerships; including limited partnerships.[66] 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.[67] These special provisions are similar to special provisions that were contained in the TRLPA and TRPA.[68]

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.[69]

Subchapter B provides the rules for adoption and contents of plans of exchange,[70] and the

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54 *Id*. § 1.002(69-c)–(69-e).

55 *Id*. §§ 10.151(b)(1)(G), 10.154(b)(1)(C), (D), *amended by* Tex. SB 860 (2015).

56 *Id*. §§ 10.001–10.902.

57 *Id*. § 10.001.

58 *Id*. §§ 10.002–10.004.

59 *Id*. § 10.008.

60 *Id*. § 10.009.

61 *Id*. § 10.010.

62 *Id*. § 10.006.

63 *Id*. § 10.005.

64 *Id*. at (g).

65 *Id*. § 10.006(i)(1).

66 *Id*. § 10.009.

67 *Id*. at (f).

68 *See* TRLPA Art. 6132a-1 § 2.11(a); TRPA Art. 6132b-9.02(a).

69 BUS. ORGS. § 10.010; *see* discussion *infra* Part XIII.A.

70 *Id*. §§ 10.052–10.053.

effect of an exchange.[71] Section 10.056 applies specifically to partnerships, including limited 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.[72] All action required by the partnership agreement to approve the interest exchange must be taken in order to effect the exchange.[73]

Subchapter C provides the rules for adoption and contents of plans of conversion, and the effect of a conversion.[74] Special provisions are set forth for partnership conversions[75] and non-profit corporation conversions.[76] Section 10.107 applies specifically to partnerships, including limited 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.[77] All action required by the partnership agreement to approve the conversion must be taken in order to effect the conversion.[78] Section 10.108 prohibits the conversion of a non-profit corporation into a for-profit entity.[79]

Subchapter C also includes Section 10.1025, which enables a relatively new type of transaction known as a "conversion and continuance."[80] In this kind of transaction, an entity may be deemed formed and domesticated in the same organizational form both in Texas and in a non-United States jurisdiction.[81] The concepts in these new provisions are based on similar concepts contained in the entity laws of the State of Delaware.[82] Foreign entities sometimes use these kinds of provisions in order to provide a means to do business in the United States while avoiding adverse foreign tax ramifications.

Subchapter D provides the requirements for the contents and filing of certificates of merger, exchange, or conversion.[83]

Subchapter E provides standard rules for abandonment of a plan of merger, exchange, or conversion.[84]

Subchapter F authorizes domestic entities to sell, lease, or convey property[85] and clarifies

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71 *Id*. § 10.055.

72 *Id*. § 10.056(1).

73 *Id*. at (3).

74 *Id*. §§ 10.101–10.106.

75 *Id*. § 10.107.

76 *Id*. § 10.108.

77 *Id*. § 10.107(b).

78 *Id*. at (c).

79 *Id*. § 10.108.

80 *Id*. § 10.1025.

81 *Id*. § 10.109.

82 *See*, *e.g,* DEL CODE ANN. tit. 8, § 390 (West 2015).

83 BUS. ORGS. §§ 10.151–10.156.

84 *Id*. §§ 10.201–10.203.

85 *Id*. § 10.251.

standard rules for what kinds of approvals are required for certain property dispositions.[86] The requirements for signing a deed or conveyance are also set forth in this subchapter.[87]

Subchapter G contains provisions intended to coordinate the Code with federal bankruptcy reorganization laws.[88] These provisions were 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.[89] This subchapter only applies to domestic for-profit corporations, professional corporations, professional associations and real estate investment trusts.[90] Subchapter H does not apply to partnerships and limited liability companies unless their governing documents adopt the provisions of the subchapter.[91]

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.[92]

The 2015 amendments to the Code clarify various provisions of Chapter 10:

(a) Certain of the amendments clarify that the consent of an owner or a member to becoming personally liable as a result of a merger, interest exchange or conversion is required as a condition to the plan of merger, plan of exchange or plan of conversion only if that personal liability is "owner liability."[93] An amendment to Section 1.002 of the Code added a corresponding definition of "owner liability," based on the definition in the Model Business Corporation Act (the "MBCA").[94] As personal liability had been understood in the provisions of Chapter 10 before the amendments, the term refers only to personal liability imposed on an owner or a member of an organization pursuant to statute or governing documents for the liabilities of the organization.[95]

(b) Other provisions of Chapter 10 were amended to clarify that a formula can be used to determine the manner and basis of converting or exchanging ownership or membership interests in a plan of merger, plan of exchange or plan of conversion.[96] These amendments,

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[86] *Id*. § 10.252.

[87] *Id*. § 10.253.

[88] *Id*. §§ 10.301–10.306.

[89] *Id.* §§ 10.351–10.368.

[90] *Id*. § 10.351(b).

[91] *Id*. at (b) and (c).

[92] *Id*. §§ 10.901–10.902.

[93] *Id*. §§ 10.001(e), 10.051(f), 10.101(f).

[94] *See* MODEL BUS. CORP. ACT § 1.40(15c).

[95] BUS. ORGS. § 1.002(63-a). Accordingly, "owner liability" does not include any liability or obligation that an owner or a member may incur or assume by a contract or an agreement, such as a guaranty of an organization's obligations, other than an agreement contained within an organization's governing document (such as a partnership agreement).

[96] *Id*. §§ 10.002(a)(5), 10.052(a)(5), 10.103(a)(5).

which were based conceptually on a recent amendment to section 152 of the Delaware General Corporation Law (the "DGCL"),[97] make express what has been implicit in the provisions before the amendments.

(c) Similarly, provisions of Chapter 10 were amended to clarify that the ownership or membership interests of an organization that is a party to a merger which survives the merger can remain outstanding rather than being converted or exchanged in the merger.[98] The amendments are based on recent amendments to the Delaware entity statutes[99] and confirm existing law and practice in mergers.

(d) Other amendments added provisions to clarify that any of the terms of a plan of merger, plan of exchange or plan of conversion may depend on facts ascertainable outside the plan if the manner that those facts operate is clearly and expressly stated in the plan.[100] The amendments are based on language in the DGCL[101] and also confirm existing law and practice.

The 2015 amendments to Chapter 10 also included substantive changes in the law regarding filings in connection with a merger. Before the amendments, an amended and restated certificate of formation, or a restated certificate of formation, of a domestic filing entity that survives a merger could not be filed with the certificate of merger; only amendments to the certificate of formation of a surviving entity could be included in the certificate of merger. The 2015 amendments now permit the certificate of formation of a domestic filing entity that survives the merger (1) to be amended in connection with the merger by attaching to, and filing with, the certificate of merger either an amended and restated certificate of formation or a certificate of amendment to the certificate of formation, or (2) to be restated without amendment through attaching to, and filing with, the certificate of merger a restated certificate of formation that does not include any amendments to the certificate of formation.[102]

VII. TITLE 2 – CORPORATIONS

A. 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.

Section 21.059(a) excludes from the requirement of having an organizational meeting of the initial Board of Directors a corporation that is created as a result of a conversion or merger

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[97] *See* tit. 8, § 152.

[98] BUS. ORGS. §§ 10.002(a)(6), 10.008(a)(8).

[99] *See* tit. 8, § 251(b).

[100] BUS. ORGS. §§ 10.002(d), 10.052(c), 10.103(c). For this purpose, "facts" is defined to include the occurrence of any event, including a determination or action by any person.

[101] *See*, *e.g.*, tit. 8, §§ 251(b), 267.

[102] BUS. ORGS. §§ 10.004(1), 10.151(b)(1), 10.151(d). An amendment to BUS. ORGS. §10.008(a)(6) also clarified that such an amended and restated certificate of formation or restated certificate of formation (without any amendment) constitutes the superseding and effective certificate of formation of that entity under BUS. ORGS. §3.063. *Id.* § 10.008(a)(6).

if the plan of conversion or merger states the bylaws and names the officers of the corporation.[103] If shares of a corporation are to be issued pursuant to a plan of conversion or a plan of merger, the consideration to be received for the shares and the manner of issuance of the shares can be as authorized, determined and provided by the plan of merger or plan of conversion.[104] In the absence of fraud in the transaction, the judgment of the party approving the plan of conversion or the plan of merger is conclusive in determining the value and sufficiency of the consideration received for the shares.[105]

A committee of the Board of Directors of a corporation may not approve a plan of merger, interest exchange or conversion of the corporation.[106] Those powers are reserved to the Board of Directors.

Subchapter J of Chapter 21 contains the provisions that specify the approval procedures for a "*fundamental business transaction.*" These provisions supplement the provisions of Chapter 10 of the Code that contain the basic provisions governing fundamental business transactions. These 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.[107] One section also cross references to the rights of dissent and appraisal for shareholders contained in Subchapter H of Chapter 10.[108]

Section 21.452 requires that any corporation that is a party to the merger under Chapter 10 must approve the merger by the Board of Directors adopting a resolution approving the merger. If shareholder approval of the merger is required, the Board of Directors either must recommend that the plan of merger be approved by the shareholders of the corporation or direct that the plan of merger be submitted to the shareholders for approval without recommendation if the Board of Directors determines for any reason not to recommend approval. The Board of Directors may place conditions on the submission of the plan of merger to the shareholders. If the Board of Directors does not recommend the plan of merger be approved, it must communicate to the shareholders the reason for its determination to submit the plan of merger without recommendation. The Board of Directors can also change its mind and determine that the plan of merger is not advisable, and in that case, the plan of merger may be submitted to the shareholders of the corporation with the recommendation that the shareholders not approve the plan of merger. Notably these provisions specify that a plan of merger may include a provision requiring that the plan of merger be submitted to the shareholders regardless of whether the Board of Directors determines, after adopting a resolution or making a determination, that the plan of merger is not advisable and recommends that the shareholders not approve the plan of merger.[109]

Section 21.453 specifies the requirements for approval by a corporation of a conversion

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[103] *Id*. § 21.059(a).

[104] *Id*. §§ 21.158, 21.160(a).

[105] *Id*. § 21.162.

[106] *Id*. § 21.416(c)(3).

[107] *Id*. §§ 21.451–21.459.

[108] *Id*. § 21.460.

[109] *Id*. § 21.452.

under Chapter 10. The Board of Directors must adopt a resolution that approves the plan of conversion and recommends it for approval by the shareholders or directs that the plan of conversion be submitted to shareholders for approval without recommendation if the Board of Directors determines for any reason not to recommend approval. The Board of Directors may place conditions on the submission of the plan of conversion to the shareholders. If the Board of Directors approves the plan of conversion but does not recommend it for approval, the Board of Directors must communicate to the shareholders the reason for the Board's determination to submit the plan without a recommendation.[110] If, after adopting the resolution approving the plan of conversion, the Board of Directors determines that the plan of conversion is not advisable, the plan of conversion may be submitted to the shareholders with a recommendation that the shareholders not approve the plan of conversion. Also, the plan of conversion may include a provision requiring that the plan of conversion be submitted to the shareholders regardless of whether the Board of Directors determines, after adopting a resolution or making a determination, that the plan of conversion is not advisable and recommends that the shareholders not approve the plan of conversion.[111]

Section 21.454 specifies how a corporation, the shares of which are to be acquired in an exchange under Chapter 10, must approve the exchange. The Board of Directors must adopt a resolution that approves the plan of exchange and recommends that the plan of exchange be approved by the shareholders or directs that the plan of exchange be submitted to shareholders for approval without recommendation if it determines for any reason not to recommend approval. The Board of Directors may place conditions on the submission of the plan of exchange to the shareholders. If the Board of Directors does not recommend that the plan of exchange be approved by the shareholders, it must communicate to the shareholders the reason for the Board's determination to submit the plan of exchange to the shareholders without a recommendation. If, after adopting the resolution approving the plan of exchange, the Board of Directors determines that the plan of exchange is not advisable, the plan of exchange may be submitted to the shareholders with a recommendation that the shareholders not approve the plan of exchange. In addition, the plan of exchange may include a provision requiring that the plan of exchange be submitted to the shareholders regardless of whether the Board of Directors determines, after adopting a resolution or making a determination, that the plan of exchange is not advisable and recommends that the shareholders not approve the plan of exchange.[112]

A sale, lease, pledge, mortgage, assignment, transfer or other conveyance of an interest in real property or other assets of a corporation does not require the approval or consent of its shareholders unless otherwise provided by its certificate of formation or the transaction constitutes "*a sale of all or substantially all of the assets*" of the corporation.[113] To approve the sale of all or substantially all of the assets, the Board of Directors of the corporation must adopt a resolution that approves the transaction and recommends that the sale of all or substantially all of the assets be approved by the shareholders or directs that the transaction be submitted to the shareholders for approval without recommendation if it determines for any reason not to recommend approval of the sale. The Board of Directors may place conditions on

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[110] *Id*. § 21.453.

[111] *Id*. at (f) and (g).

[112] *Id*. § 21.454.

[113] *Id.* §§ 21.451(2), 21.455(a).

the submission of the proposed sale to the shareholders. If the Board of Directors does not recommend that the proposed sale be approved, it must communicate to the shareholders the reason for the Board's determination to submit the proposed sale to the shareholders without recommendation. After the approval of the sale by the shareholders, the Board of Directors may abandon the sale of all or substantially all of the assets of the corporation, subject to the rights of a third party under a contract relating to the assets, without further action or approval by the shareholders.[114]

Section 21.401 of the Code specifies that a director is entitled to consider, in discharging his or her duties, the long-term and short-term interests of the corporation and its subsidiaries. This includes the possibility that those interests may be best served by the continued independence of the corporation. Thus, the members of the Board of Directors, in the exercise of their business judgment, may determine to reject a merger or acquisition offer from a third party if they determine such merger or acquisition is not in the long-term or short-term interests of the corporation and its subsidiaries, including the corporation's continued independence.[115] Section 21.401(c) provides that a director is also entitled to consider any "social purposes" specified in the corporation's certificate of formation in discharging the director's duties.[116] Section 21.401(d) provides the same authority to and protection for officers of the corporation in discharging the officers' duties. Another provision in Chapter 21 specifies that the authority and protection provided in Section 21.401(c) and (d) regarding for-profit corporations that have a social purpose stated in their certificate of formation are not intended to prohibit or limit a director or officer of other for-profit corporations from considering, approving or taking an action that promotes or has the effect of promoting a social, charitable or environmental purpose.[117]

If a fundamental business transaction is required to be submitted to the shareholders of the corporation for approval, the corporation must notify each shareholder that the fundamental business transaction is being submitted for approval at a meeting of shareholders, regardless of whether the shareholders are entitled to vote on the matter.[118] If the fundamental business transaction is a merger, conversion or interest exchange, the notice must contain or be accompanied by a copy or summary of the plan of merger, conversion or interest exchange and the notice of the shareholders' dissent and appraisal rights as required by Section 10.355.[119] Notice of the meeting must be given not later than the 21st day before the day of the meeting and state that the purpose of the meeting is to consider the fundamental business transaction.[120]

Unless otherwise provided by the certificate of formation of the corporation, the affirmative vote of the holders of at least two-thirds of the outstanding shares of the corporation entitled to vote on a fundamental business transaction is required to approve the

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[114] *Id*. § 21.455.

[115] *Id*. § 21.401(b).

[116] *Id*. § 21.401(c); *see also id.* § 1.002(82-a) (defining social purposes).

[117] *Id*. § 21.401(e).

[118] *Id*. § 21.456(a).

[119] *Id*. at (b). As described below in Part XIII.H of this article, shareholders also have dissent or appraisal rights in certain types of mergers in which a shareholder vote on the merger is not required.

[120] *Id*. at (c).

transaction.[121]

Unless otherwise provided in the certificate of formation, shares of a class or series that are not otherwise entitled to vote on matters submitted to shareholders generally are not entitled to vote for the approval of a fundamental business transaction. However, Section 21.458(a) specifies that separate voting by class or series of shares is required for approval of a plan of merger or conversion if the plan contains a provision that would require approval by that class or series of shares under Section 21.364 if the provision was contained in a proposed amendment to the certificate of formation or if the class or series is entitled under the certificate of formation to vote as a class or series on the plan of merger or conversion.[122] Similarly, Section 21.458(b) requires that the separate voting by a class or series of shares of a corporation is required for approval of a plan of exchange if those shares are to be exchanged under the terms of the plan or the class of series is entitled to such separate vote under the certificate of formation.[123] Separate voting by a class or series of shares is required for approval of the sale of all or substantially all of the assets of a corporation only if the certificate of formation requires the separate vote on the sale.[124] If a class or series of shares is entitled to vote separately, the affirmative vote of the holders of at least two-thirds of those shares must approve the fundamental business transaction except as provided by the Code.[125]

No approval by the shareholders of a corporation that is simply a party to the plan of merger is required unless that corporation is also a "*party to the merger.*"[126] Section 21.459 specifies certain types of mergers that do not require the approval by the shareholders of a corporation.[127]

A corporation may convey its real property when authorized by appropriate resolution of the Board of Directors.[128] Similarly, the Board of Directors may authorize a pledge, mortgage, deed of trust or trust indenture without authorization or consent of its shareholders unless otherwise required by its certificate of formation.[129]

Subchapter L of Chapter 21 contains provisions relating to derivative proceedings in the right of a corporation. Section 21.552 (formerly Section 21.552(a)) and existing Texas case law do not afford standing to a shareholder to bring or continue a derivative proceeding after a merger if the shareholder otherwise does not have standing (e.g., because the shareholder is no longer a shareholder of a surviving corporation in the merger).[130]

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[121] *Id*. § 21.457(a).

[122] *Id*. § 21.458(a).

[123] *Id.* at (b).

[124] *Id*. at (c).

[125] *Id*. § 21.457(c).

[126] *Id*. at (d).

[127] *Id*. § 21.459.

[128] *Id*. § 21.462.

[129] *Id*. § 21.461.

[130] *See, e.g.*, Somers v. Crane, 295 S.W.3d 5, 13 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *see also* BUS. ORGS. § 21.552.

Subchapter M of Chapter 21 applies to business combinations involving an "*issuing public corporation*" with its "*affiliated shareholder*," which is a shareholder that is the "*beneficial owner*" of more than 20 percent of the outstanding voting shares of the corporation, or other sale, lease, exchange, mortgage, pledge, transfer or other disposition in a transaction or a series of transactions with an affiliated shareholder of assets of the issuing public corporation. An "*issuing public corporation*" means a domestic corporation that has 100 or more shareholders of record, a class or series of its voting shares registered under the Securities Exchange Act of 1934, as amended, or a class or series of its voting shares qualified for trading on a national securities exchange.[131] The definition of "*beneficial owner*" is a broad one, similar to the one set forth in Rule 13d-3 adopted by the Securities and Exchange Commission for the Securities Exchange Act of 1934, as amended.[132] These business combination provisions prohibit a business combination with an affiliated shareholder during a three-year period immediately following the affiliate shareholder's share acquisition date.[133] The three-year moratorium period does not apply, however, if the business combination or the purchase or acquisition of shares made by the affiliated shareholder is approved by the Board of Directors of the issuing public corporation before the share acquisition date or the business combination is approved by the affirmative vote of the holders of at least two-thirds of the outstanding voting shares not beneficially owned by the affiliated shareholder.[134] Careful review of the provisions of Subchapter M must be undertaken if a corporation constitutes an issuing public corporation and engages in any kind of transaction with a shareholder that is a beneficial owner of more than 20 percent of its outstanding voting shares.

B. Nonprofit Corporations. Chapter 22 is the main chapter that governs non-profit 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 D of Chapter 22 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 of the Code, (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 substantially all of the assets of the corporation.[135] Each of these actions in the TNPCA had 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.[136]

Subchapter F contains the provisions that specify the approval procedures for a "*fundamental business transaction*," which means a merger, interest exchange, conversion or

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131 BUS. ORGS. § 21.601(1).

132 This definition applies only for purposes of subchapter M of Chapter 21. *See id*. § 21.603.

133 *Id*. § 21.606.

134 *Id*.

135 *Id*. § 22.164(a).

136 *Id*. § 22.164.

sale of all or substantially all of the corporation's assets.[137] These provisions supplement the provisions of 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.[138]

C. 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 general provisions specifying that Chapter 21 of the Code applies 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. [139] On the other hand, if the special-purpose corporation is organized not for-profit, then Chapter 22 applies to it, to the extent not inconsistent with the special statute.[140] The provisions also authorize the special statute to specifically incorporate Title 1 and Chapter 21 or 22 of the Code to supplement the special statute.[141]

VIII. 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.[142] 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.[143]

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. In the absence of a governing provision in the company agreement, the provisions of Chapter 101 will apply as "default" provisions. Section 101.054 specifies what provisions of Chapter 101 cannot be waived or modified in the company agreement.

Subchapter H of Chapter 101 contains provisions that govern meetings and voting by the governing authority, members or a committee of the governing authority of the company.[144]

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137 *Id*. § 1.002(32).

138 *Id*. §§ 22.251–22.253, 22.256–22.257.

139 *Id*. § 23.001(a)(1).

140 *Id*. at (a)(2).

141 *Id*. at (b).

142 *See id* §101.001(1) (Defining "company agreement" to be any agreement, written or oral, of the members concerning the affairs or the conduct of the business of a limited liability company).

143 *Id*.

144 *Id*. § 101.351.

Provisions are set forth that are supplemental to Chapter 6 governing notices of meetings.[145] Section 101.356 specifies the vote required to approve certain actions, including fundamental business transactions.[146] Provisions also authorize the use of proxies[147] and action by less than unanimous written consent.[148] Section 101.359 authorizes actions to be taken in less formal manner, including valid consents based on knowing silence.[149]

Section 101.052(e) of the Code states that a company agreement of a limited liability company may provide rights to any person, including a person who is not a party to the agreement, to the extent set forth in the agreement.[150] Such a person may include a manager, officer, or creditor of the limited liability company, and those rights may include rights regarding all or certain fundamental business transactions of the limited liability company if the members so desire.

Section 101.605 of the Code states that a series of a limited liability company has the power and capacity, in the series' name, to (among other things) sue, to contract, to acquire and sell assets, to grant liens in its assets and to exercise any powers or privileges as necessary or appropriate to the conduct, promotion or attainment of the business, purpose or activities of the series. Also, Section 101.609(c) provides that a series of a limited liability company and the governing persons and officers associated with the series have, among other things, the powers and rights regarding the sale, lease and conveyance of property described in Subchapter F of Chapter 10 of the Code. It is important to note, however, that, because a series is not a separate domestic entity,[151] the Code does not provide any express authority to a series to engage in a merger, interest exchange or conversion under Subchapters A, B or C, respectively, of Chapter 10 of the Code.

IX. 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[152] and specify how a person has knowledge or notice of a fact for purposes of Title 4.[153]

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.

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145 *Id*. § 101.352.
146 *Id*. § 101.356.
147 *Id*. § 101.357.
148 *Id*. § 101.358.
149 *Id*. § 101.359.
150 *Id*. § 101.052(e).
151 *Id*. § 101.622.
152 *Id*. § 151.001.
153 *Id*. §§ 151.002, 151.003.

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, as described in Section 152.002. The section also specifies what provisions of can be waived or modified in the partnership agreement, with certain exceptions.

Chapter 152 does not contain any specific provisions relating to fundamental business transactions or their approval by partners. Those provisions are located in special sections in Chapter 10.

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.[154] Section 153.004 is a particularly important provision that clarifies what provisions of Chapter 153 can be waived or modified, and what provisions cannot be waived or modified, in the partnership agreement of the limited partnership.

Chapter 153 does not contain any specific provisions governing fundamental business transactions or their approval by partners. Those provisions are located in special sections in Chapter 10. A limited partner does not participate in the control of the business and lose its liability shield simply because the limited partner proposes, approves or disapproves a sale or other transfer of any asset of the limited partnership or a merger, conversion or interest exchange of the limited partnership.[155]

D. Both General and Limited Partnerships. Chapter 154, the fourth Chapter, contains provisions applicable to both general and limited partnerships. Those provisions generally concern the nature of an interest in a partnership, certain authorized rights that may be set forth in a partnership agreement and certain partnership transactions and relationships. Section 154.104 states that a partnership agreement of a general or limited partnership may provide rights to any person, including a person not a party to the agreement, to the extent set forth in the agreement. Such a person may include, for example, an officer or a creditor of the partnership.

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[154] The term "other limited partnership provisions" in Section 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.

[155] *Id*. § 153.103(9)(C), (N).

X. TITLE 5 – REAL ESTATE INVESTMENT TRUSTS

Title 5 has only one chapter, Chapter 200. Subchapter A contains the general provisions, including the critical definition of what constitutes a real estate investment trust.[156] Subchapter A contains supplemental provisions regarding the powers of a real estate investment trust in addition to those provisions contained in Chapter 2.[157] These general provisions also include provisions governing ultra vires acts[158] and the requirements for signing filing instruments by officers.[159]Subchapter A incorporates the provisions of Chapters 20 and 21 governing for-profit corporations unless there is a conflict with any provision in Chapter 200.[160] Section 200.002 specifies that an unincorporated trust that does not meet the requirements of Chapter 200 is an unincorporated association. In lieu of a Board of Directors, a real estate investment trust has trust managers. A committee of the trust managers may not approve a plan of merger or a share exchange of the real estate investment trust, because that power is reserved to the board of trust managers.[161]

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.[162] These provisions supplement the provisions of Chapter 10 that contain the basic provisions governing fundamental business transactions. These 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.[163] One section also cross-references to the rights of dissent and appraisal for shareholders contained in Subchapter H of Chapter 10.[164]

XI. TITLE 6 – ASSOCIATIONS

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

B. Cooperative Associations. Subchapter A contains general provisions, including the definitions that are applicable to Chapter 251.[165] In addition, Subchapter A incorporates the provisions of Chapters 20 and 22 governing non-profit corporations, unless there is a conflict with any provision in Chapter 251.[166] 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

156 *Id*. § 200.001.
157 *Id*. § 200.005.
158 *Id*. § 200.004.
159 *Id*. § 200.006.
160 *Id*. § 200.002.
161 *Id*. § 200.311(c)(3).
162 *Id*. § 1.002(32).
163 *Id*. §§ 200.402–200.409.
164 *Id*. § 200.410.
165 *Id*. § 251.001.
166 *Id*. § 251.002.

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 Chapter 251. Nevertheless, even though not subject to Chapter 251, if they are formed as corporations, they may be subject to the non-profit corporation provisions of Chapter 22 by virtue of Chapter 23's provisions governing special-purpose corporations formed under statutes outside the Code.[167]

Because Chapter 251 incorporates the provisions of Chapter 22 governing non-profit corporations, it does not have any specific provision governing the approval of fundamental business transactions.

C. Unincorporated Nonprofit Associations. Chapter 252 contains almost verbatim the former provisions of the TUUNAA. Very few changes were made from that prior statute. However, Section 252.017 specifies that Chapters 1 and 4 and, if a non-profit association designates an agent for service of process, Subchapter E of Chapter 5 apply to a non-profit association. The same section specifies that no other provisions of the Code (which include Chapter 10) apply to a non-profit association. Chapter 252 does not contain any specific provision authorizing mergers or conversions or governing the approval of fundamental business transactions. Based on this lack of authority and informal discussions with members of the staff of the Texas Secretary of State, it is our understanding that the Secretary of State's office does not accept filings of certificates of merger or conversion for unincorporated non-profit associations.

XII. 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.[168] 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, including definitions of professional corporation, professional association, professional limited liability company and professional service.[169]

B. Professional Associations. Chapter 302 applies only to professional associations and was derived from the TPAA. This Chapter incorporates the provisions of Chapters 20 and 21 governing for-profit corporations, unless there is a conflict with any provision in Title 7.[170] Because of these incorporated provisions, this Chapter does not have any special provision governing approval of fundamental business transactions.

C. Professional Corporations. Chapter 303 contains special provisions applying only to

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[167] *Id*. §§ 23.001–23.003.

[168] *Id*. § 300.001(c).

[169] *See id.* § 301.003(2), (3), (6), (8).

[170] *Id*. § 302.001.

professional corporations and was derived solely from the TPCA. This Chapter incorporates the provisions of Chapters 20 and 21 governing for-profit corporations, unless there is a conflict with any provision in Title 7.[171] Because of these incorporated provisions, this Chapter does not contain any special provision governing approval of fundamental business transactions.

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 Chapter 101 governing limited liability companies generally, unless there is a conflict with any provision in Title 7.[172] Because of these incorporated provisions, this Chapter does not contain any special provision governing approval of fundamental business transactions.

XIII. 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*."[173]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.[174] The notice of the meeting at which the merger is approved must include an additional notice if the domestic entity is subject to dissenters' rights.[175] 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.[176] 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 a member of that entity will, as a result of the merger, become subject to owner liability, without that owner's or member's consent, for a liability or other obligation of any other person.[177]

The plan of merger must be in writing (though it need not be signed) and must include, among other things, the manner and basis of converting or exchanging any of the ownership or membership interests of each organization that is a party to the merger into: (A) ownership

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171 *Id*. § 303.001.

172 *Id*. § 304.001.

173 *Id*. § 1.002(55).

174 *Id.* § 10.001(a)–(b).

175 *Id*. §§ 10.001(c), 10.355(b).

176 *Id*. § 10.001(d).

177 *Id*. §§ 10.001(e), 1.002(63-a).

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.[178] If any of the ownership or membership interests are to be canceled rather than converted or exchanged, or if any of the ownership or membership interests of a surviving organization are to remain outstanding, the plan of merger must so state.[179] "Any of the terms of the plan of merger may be made dependent on facts ascertainable outside the plan if the manner in which those facts operate on the terms of the merger is clearly and expressly stated in the plan."[180]

A plan of merger may treat differently the owners or members in the same class or series.[181]Section 10.002(c) of the Code states that an ownership or membership interest of a particular series or class may be canceled while other ownership or membership interests of the same class or series are converted or exchanged for other consideration as a result of the merger.

If applicable, 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.[182]

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 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.[183] 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.[184] In addition, all of the liabilities and obligations of

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178 *See id.* §10.002(a)(5) (a formula may be used as the manner and basis of the conversion or exchange).

179 *Id*. at (a)(6).

180 *Id*. at (d).

181 *Id*. at (c).

182 *Id*. at (a).

183 *Id*. § 10.003.

184 *Id*. § 10.008(a)(2).

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.[185] "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."[186] 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.[187] 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 that purpose by another provision of the Code.[188] 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.[189]

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.[190]

The certificate of merger that must be filed in the state of Texas must contain either a copy of the plan of merger or alternative required statements. The alternative required statements include, 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

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185 *Id*. at (a)(3)–(4).

186 *Id*. at (a)(9).

187 *Id*. at (b) (We believe that it would be unusual for the parties to desire the statutory "default" allocation of property, liabilities or obligations.).

188 *Id*. at (d).

189 *Id*. at (c)(2).

190 *Id*. § 10.151(a)(1).

or non-Code 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.[191] 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.[192] 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.[193]

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.[194] 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 (including a limited partnership).[195] 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.

The 2015 amendments to the Code added provisions to Section 21.459 to authorize the acquisition of a Texas public for-profit corporation, whose shares are listed on a national securities exchange or are held of record by more than 2,000 holders, through a "two-step" tender or exchange offer and merger process.[196] The process consists of a "front-end" tender or exchange offer for the target corporation's shares by the acquirer followed by a "back-end" merger between the acquirer and the target. If the conditions stated in new Section 21.459(c) are met, the back-end merger may be effected without a shareholder vote or consent regarding the merger. The key conditions include: (1) The tender or exchange offer must be for all of the shares of the target, other than those owned by the acquirer or its affiliates.[197] (2) The plan of merger must expressly require or permit reliance on Section 21.459(c).[198] (3) Upon consummation of the tender or exchange offer, the acquirer must own (by acquisition through the offer or otherwise) the number or percentage of the shares, and of each class or series of those shares, that would be necessary under the Code and the certificate of formation to approve a merger at a shareholders' meeting of the target.[199] (4) The holders whose shares are converted and exchanged in the merger must be entitled to receive the same consideration as the holders who tendered shares to the acquirer in the tender or exchange offer.[200] (5) The

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191 *Id*. at (b)(1)(H).

192 *Id*. at (b)(2).

193 *Id*. at (b)(3).

194 *Id*. § 10.005(g).

195 *Id*. § 10.006(i)(1).

196 *Id*. § 21.459.

197 *Id*. at (c)(2).

198 *Id*. at (c)(1)(A).

199 *Id*. at (c)(3).

200 *Id*. at (c)(5).

merger must be effected as soon as practicable after the tender or exchange offer.[201] (6) The target shareholders must be granted dissenters' rights.[202] Special definitions of certain terms, which conform to typical tender-offer practice, were also added to Section 21.459.[203] These amendments to Section 21.459 are based on section 251(h) of the DGCL as adopted in 2013 and amended in 2014. As described below in Part XIII.H of this article, amendments were also made to various provisions of Chapter 10 to confirm that dissenters' rights apply to a back-end merger under Section 21.459(c).

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.[204] 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.[205] 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."[206]

The partnership agreement of each domestic partnership (including a limited 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 non-surviving domestic partnership as of the effective date of the merger. The Code contains other special provisions governing mergers of a domestic partnership.[207]

B. Conversions. A domestic entity may convert into a different type of domestic entity or a non-Code organization by adopting a written plan of conversion. [208] 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.[209]

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.[210]

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201 *Id*. at (c)(1)(B).

202 *Id*. § 10.354(a)(1)(F).

203 *Id*. § 21.459(d)–(e).

204 *Id*. § 10.010(a).

205 *Id*. at (c).

206 *Id*. at (d).

207 *Id*. § 10.009.

208 *Id*. § 10.101(a).

209 *Id*. §§ 10.101(c), 10.355.

210 *Id*. § 10.101(d).

A domestic entity may not convert if an owner or a member of the domestic entity will, as a result of the conversion, becomes subject to owner liability, without the consent of the owner or member, for a liability or other obligation of the converted entity.[211]

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 of the organization's jurisdiction of formation and the organization's governing documents.[212] 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.[213]

The plan of conversion must be in writing (though it need not be signed) and must include, among other things, the manner and basis of converting the ownership or membership interests of the converting entity.[214] Any of the terms of the plan of conversion may be made dependent on facts ascertainable outside the plan if the manner in which those facts operate on the terms of the conversion is clearly and expressly stated in the plan.[215]

The plan of conversion also must include any certificate of formation required to be filed under the Code if the converted entity is a filing entity.[216] 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 (1) reversion or impairment, (2) further act or deed, or (3) 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 Texas 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.[217]

If the converted entity is a domestic partnership (including a limited 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.[218] A domestic non-

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211 *Id*. §§ 10.101(f), 1.002(63-a).

212 *Id*. § 10.102(a)–(b).

213 *Id*. at (e).

214 A formula may be used as the manner and basis of the conversion of the interests.

215 BUS. ORGS. § 10.103(c).

216 *Id*. at (a)(6).

217 *Id*. § 10.106.

218 *Id*. § 10.107.

profit corporation is prohibited from converting into a for-profit entity.[219]

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.[220] 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 converting 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.[221]

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.[222]

Because a conversion of ownership or membership interests is not required in such a conversion and continuance transaction, a description of such conversion is not necessary in the plan of conversion.[223] Additionally, 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. The effects of a conversion and continuance transaction 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.[224] 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

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219 *Id*. § 10.108.

220 *Id.* § 10.154(a).

221 *Id*. § 10.154.

222 *See id*. §§ 9.001, 1.002(28).

223 *Id*. § 10.103(a).

224 *Id*. § 10.109.

continue its existence in its current organizational form and jurisdiction of formation.[225]

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.[226] 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 effected if an owner or a member of a domestic entity that is a party to the interest exchange will, as a result of the exchange, become subject to owner liability, without the consent of the owner or member, for the liabilities or obligations of any other person or organization.[227]

> The plan of exchange must be in writing (though it need not be signed) and must include the manner and basis of exchanging the ownership or membership interests to be acquired[228] 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 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.[229] Any of the terms of the plan of exchange may be made dependent on facts ascertainable outside the plan if the manner in which those facts operate on the terms of the interest exchange is clearly and expressly stated in the plan.[230]

If a domestic partnership (including a limited 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 effect the exchange."[231]

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225 *Id*. § 10.154(c).

226 *Id*. §§ 10.051–10.056.

227 *Id*. §§ 10.051, 1.002(63-a).

228 A formula may be used as the manner and basis of the exchange of the interests.

229 BUS. ORGS. § 10.052.

230 *Id*. at (c).

231 *Id*. § 10.056.

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. Additionally, 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.[232]

The provisions relating to filing of a certificate of exchange are generally parallel to those for filing a certificate of merger under the Code.[233]

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.[234] 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.[235] 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.[236]

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.[237]

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 Section 21.455 of the Code.[238]

E. Franchise Taxes. A common problem to avoid in filing of the certificate of merger, conversion or exchange is the failure to provide a certificate from the Texas Comptroller evidencing the good standing for payment of Texas franchise taxes of the domestic entities

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[232] *Id*. § 10.055.

[233] *Id*. §§ 10.151, 10.153.

[234] Sections 101.605 and 101.609(c) of the Code also express the authority of a series of a limited liability company to, among other things, sell, lease and convey the property of the series.

[235] BUS. ORGS. § 10.251.

[236] *Id*. § 10.252.

[237] *Id*. § 10.254.

[238] *Id*. § 21.455.

involved in the merger, conversion or interest exchange.[239] Alternatively, a statement can be set forth in the certificate of merger, conversion or exchange that one or more of the surviving new or acquiring organizations or the converted entity is liable for the payment of the required franchise taxes.[240]

F. Approval Procedures. The procedures for approval of fundamental business transactions by the governing authority, owners or members of domestic entities are generally located in the separate titles governing those types of entities as well as Chapter 6 Meetings and Voting.[241] The primary exception to this rule is the provisions contained in Chapter 10 governing the approvals by partnerships of fundamental business transactions.[242]

G. Abandonment. 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, 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, exchange or conversion and after approval of the merger, interest exchange or conversion by the owners or members.[243] Additionally, if the certificate of merger, 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.[244]

H. Dissenters' Rights. Shareholders of domestic for-profit corporations, domestic professional corporations, domestic professional associations and domestic real estate investment trusts have dissenters' rights under the Code regarding certain transactions.[245] 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 its provisions for dissenters' rights in their governing documents.[246] The following is a summary of various provisions of the Code regarding dissenters' rights up to the appraisal proceedings before a court.[247] The summary assumes that the entity taking an action giving rise to dissenters' rights is a for-profit corporation, that the dissenting owner is a shareholder and that the ownership interests as to which the dissenters' rights are exercisable are shares.

A shareholder is granted dissenters' rights under Section 10.354 in connection with (1) any fundamental business transaction on which such shareholder is entitled to vote, (2) any

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[239] *Id*. § 10.156(2).

[240] *Id*.

[241] *See*, *e.g.*, *id*. §§ 21.452–21.455.

[242] *See id*. §§ 10.009, 10.056, 10.108.

[243] *Id*. § 10.201.

[244] *Id*. § 10.202.

[245] *Id*. §§ 10.351(b), 21.460, 303.001, 302.001, 200.410.

[246] *Id*. § 10.351(c).

[247] We focus on the provisions regarding dissenters' rights up to the appraisal proceeding because it is those provisions which were amended in 2015 and in the preceding few Texas legislative sessions and because there is a good summary of the provisions of the Code and the case law, and certain unanswered questions, regarding appraisal proceedings in Miller & Ragazzo, 20A *Texas Practice: Business Organizations* (3d ed.) §§ 40.15–.17.

plan of exchange under which such shareholder's shares are to be acquired, (3) any short-form merger in which such shareholder's shares are to be converted or exchanged and (4) (because of the 2015 amendments to the Code) any back-end merger under Section 21.469(c) in which such shareholder's shares are converted or exchanged.[248] However, dissenters' rights do not apply to a plan of merger (if there is only one surviving entity or non-code organization) or a plan of conversion or exchange if (1) the shareholder's shares before the transaction are of a class or series of shares that are listed on a national securities exchange or held of record by at least 2,000 persons, (2) the shareholder is not required to accept any consideration different from the consideration provided to other holders of shares of the same class or series and (3) the shareholder is not required to accept any consideration other than shares or ownership interests of a class or series that will be listed or authorized for listing on a national securities exchange or held of record by at least 2,000 holders, or cash in lieu of fractional shares or ownership interests. This exception, however, does not apply to a shareholder of a subsidiary involved in a short-form merger or, because of the 2015 amendments to the Code, any back-end merger under Section 21.469(c).[249]

For any action (i.e., a fundamental business transaction) subject to dissenters' rights, (1) the corporation or other entity responsible for notices and payment of value upon exercise of dissenters' rights (the "responsible organization") must give notice of dissenters' rights to each shareholder having such right either with the notice of the shareholders' meeting, if such a meeting is to be held,[250] or with the request for such shareholder's written consent, if the shareholders are to act by written consent;[251] (2) in connection with a short-form merger, the responsible organization must give notice of dissenters' rights to the domestic subsidiary's shareholders no later than 10 days after the merger is effective;[252] and (3) in connection with a back-end merger, the responsible organization must give notice of dissenters' rights to the shareholders who have such rights no later than 10 days after the merger is effective.[253] In any case, the notice must include a copy of subchapter H of Chapter 10 of the Code (Rights of Dissenting Owners) and the address of the responsible organization's principal executive offices to which the shareholder may send a notice or demand to exercise his dissenters' rights.[254] Under the 2015 amendments to the Code, in the case of a back-end merger under Section 21.469(c), the notice of dissenters' rights may be given at any time before or within 10 days after the effectiveness of the merger, and it is typical practice for such a notice to be given before the effectiveness of the merger, when the target responds to the tender or exchange offer as required under the federal securities laws. If the notice is given before the consummation of the tender or exchange offer, it must be given to each shareholder to whom the tender or exchange offer is made; but if the notice is given after the consummation of the tender or exchange offer (which must be not long before the effectiveness of the merger), it must be given to each shareholder who did not tender shares in such offer.[255] If the notice is given

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248 BUS. ORGS. §§ 10.354(a), 21.469(c).

249 *Id*. § 10.354(b)–(c).

250 *Id*. § 10.355(a)(1), (d)(1).

251 *Id*. at (a)(2) and (d)(2).

252 *Id*. at (b).

253 *Id*. at (b-1).

254 *Id*. at (c).

255 *Id*. at (d)(3).

before the effective date of the merger, then unless the notice contains a statement of the effective date of the merger, a second notice must be given after the effective date of the merger stating the effective date of the merger. If the notice is given on or after the effective date of the merger, it must include a statement of the effective date of the merger.[256]

With respect to any action submitted to a vote at a shareholders' meeting, the responsible organization must also give a notice that the action has become effective to each shareholder who sent notice of his intent to exercise his dissenters' rights and who voted against the action at the meeting. Such notice must be given no later than the 10th day after the action becomes effective.[257] With respect to any action approved by a written shareholders' consent, the responsible organization must also give a notice that the action has become effective to each shareholder whose written consent was not given or requested and who therefore did not receive the requisite notice when his written consent was requested. Such notice must be given no later than the 10th day after the action becomes effective.[258]

To exercise or *"perfect"* dissenters' rights, a shareholder must take certain actions specified by Section 21.356; a shareholder will lose his rights if there is any failure to comply. In general, the required actions to perfect dissenters' rights are as follows:

If the proposed action (i.e., a fundamental business transaction) is to be voted on at a shareholders' meeting, the shareholder must give the responsible organization a notice, before the meeting, indicating his intent to exercise his dissenters' rights,[259]

The shareholder must either vote against the action at the meeting or must not execute a shareholder's written consent in favor of the action,[260]

Within 20 days after the responsible organization's notice to the shareholder that the action has become effective, the shareholder must give the responsible organization a written demand for payment of the fair value of his shares.[261] In accordance with the 2015 amendments to the Code, however, in the case of a back-end merger under Section 21.459(c), the shareholder must make demand within either 20 days after the responsible organization gives the initial required notice of dissenters' rights or the date on which the tender or exchange offer is consummated, whichever is later,[262]

Within 20 days after the shareholder makes a demand for payment of fair value, he must submit to the responsible organization any stock certificates representing his shares as to which he is demanding payment, so that notation may be made on the certificate that payment has been demanded.[263] A shareholder who has made demand for payment of the fair value of his

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256 *Id*. at (f).

257 *Id*. at (e).

258 *Id*. at (d)(2).

259 *Id*. § 10.356(b)(1).

260 *Id*. at (b)(2).

261 *Id*. at (b)(3).

262 *Id*. at (b)(3)(E)(iv).

263 *Id*. § 10.356(d).

shares may withdraw such demand at any time before payment is made for such shares or a petition is filed and thereafter only with the consent of the responsible organization.[264]

Within 20 days after the responsible organization receives the demand, it must respond in writing to accept or reject the value or price demanded. If the responsible organization accepts the demand, it must pay the amount, in exchange for delivery of the shares, within 90 days after the action that is the subject of the demand (i.e., the fundamental business transaction) became effective.[265] If the responsible organization rejects the value or price demanded, it must provide to the dissenting shareholder its estimate of the fair value of the shares and offer to pay such amount.[266] If the dissenting shareholder accepts the offer, he must give notice of acceptance to the responsible organization within 90 days after the action that is the subject of the demand became effective.[267] Upon such agreement between the dissenting shareholder and the responsible organization, or if the dissenting shareholder and the responsible organization otherwise agree on the fair value of the shares, then the responsible organization must pay the agreed amount, in exchange for delivery of the shares, within 120 days after the action that is the subject of the demand became effective.[268]

If the responsible organization and the dissenting shareholder are unable to reach agreement within the period described in the preceding paragraph, then either party may file a petition to have a court determine the fair value of the shares.[269] The petition must be filed, within 60 days after the expiration of the period for considering the responsible organization's offer of fair value, in a court in the county of Texas in which the responsible organization's principal office is located or, if the responsible organization has no business office in Texas, in the county in which the responsible organization's registered office in Texas is located.[270] If the responsible organization files the petition, the petition must be accompanied by a list of the names and addresses of the shareholders who have demanded appraisal and who have not agreed on the value or price of the shares. If the dissenting shareholder files the petition, the responsible organization must file such a list with the clerk of the court within 10 days after the responsible organization is served with the petition, and the clerk must subsequently send a notice of the time and place of the appraisal hearing to each dissenting shareholder.[271] If the record or registered holder of the shares is the trustee of a voting trust or the nominee holder of the shares for a beneficial holder and has perfected the dissenters' rights, such beneficial owner may file the petition and participate in the appraisal proceedings without the need for the record or registered holder to be the plaintiff or to participate in the appraisal proceedings.[272]

In the appraisal proceeding, the court must determine the "fair value" of the shares as of the date preceding the date of the action that is the subject of the appraisal, specifically

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264 *Id*. § 10.357.

265 *Id*. § 10.358(a)(1), (b).

266 *Id*. at (a)(2) and (c).

267 *Id*. at (d).

268 *Id*. at (e).

269 *Id*. § 10.361(a).

270 *Id*. at (a) and (b).

271 *Id*. at (c) and (d).

272 *Id*. at (g).

excluding any appreciation and depreciation in value because of anticipation of such action or the result of such action,[273] and must appoint one or more qualified appraisers to determine the fair value.[274]

XIV. MISCELLANEOUS PROVISIONS IN OTHER CHAPTERS IN TITLE 1

A. Chapter 3 Formation and Governance. Chapter 3 of the Code contains several provisions that will apply to domestic entities engaged in fundamental business transactions. Section 3.005 specifies the requirements for the certificate of formation that must be filed with the filing officer in order to form a domestic filing entity.[275] One of the provisions in that Section states that a filing entity formed under a plan of conversion or merger need not state the name and address of its organizer, but must state that it was formed under a plan of merger or conversion.[276] If formed under a plan of conversion, the certificate of formation must state the name, address, date of formation, prior form of organization and jurisdiction of formation of the converting entity.[277] In addition, the certificate of formation of the domestic filing entity must be filed with the certificate of conversion or merger.[278] The formation and existence of a domestic filing entity that is a converted entity in a conversion or that is created under a plan of merger takes effect and commences on the effectiveness of the conversion or merger.[279] For a limited partnership formed pursuant to a merger or a conversion, the plan of merger or conversion may include the partnership agreement for the limited partnership.[280]

B. Chapter 4 Filings. Chapter 4 of the Code contains the general provisions specifying the requirements for filing instruments to be filed with the Texas Secretary of State. Any certificate of merger, conversion or exchange must meet these requirements before being permitted to be filed. Subchapter D of Chapter 4 imposes filing fees on various filings with the Texas Secretary of State.[281] The filing fee for a certificate of merger or conversion (other than a filing on behalf of a nonprofit corporation) is $300, plus, with respect to a merger, any fee imposed for filing a certificate of formation for each newly created filing entity or, with respect to a conversion, the fee imposed for filing a certificate of formation for the converted entity.[282] For a non-profit corporation, the filing fee for a certificate of merger or a conversion is $50.[283]

C. Chapter 5 Registered Agents. Chapter 5 of the Code contains provisions that require an entity to obtain the prior consent of its registered agent to serve in that capacity for the entity. Section 5.2011 specifies that the designation or appointment of a person as registered

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[273] *Id*. § 10.362.
[274] *Id*. § 10.361(e).
[275] *Id*. § 3.005.
[276] *Id*. at (e)(6)–(7).
[277] *Id*. at (a)(7).
[278] *Id*. § 3.006(a).
[279] *Id*. § 3.006.
[280] *Id*. § 3.011(b).
[281] *Id*. §§ 4.151–4.161.
[282] *Id*. § 4.151(5).
[283] *Id*. § 4.153(3).

agent by an organizer or managerial official of an entity in a registered agent filing is an affirmation that the person named as registered agent has consented to serve in that capacity.[284] This section also specifies that following a sale, acquisition, or transfer of a majority in interest or a majority interest of the outstanding ownership or membership interests of a represented entity, if the registered agent continues to serve in that capacity, the person's continuation of service is an affirmation by the governing authority of the represented entity that the governing authority has verified that the person named as registered agent has consented to continue to serve in that capacity.[285] This requirement can be a trap for the unaware in the context of a merger, acquisition or change in control. The consent of a person, whether an individual or organization, to serve as the registered agent of the entity must be set forth in a written or electronic form developed by the Texas Secretary of State's Office, but there is no form specified for the required verification of the registered agent's consent to continue to serve upon the sale, acquisition or transfer of a majority of the outstanding ownership or membership interests.[286]

D. Chapter 6 Meetings and Voting. Chapter 6 of the Code specifies general rules concerning meetings, voting, actions by written consent, and record dates. Some of these provisions will apply to domestic entities engaged in fundamental business transactions. For example, the general provisions regarding the notice requirements and waiving of notices for a meeting of owners to approve a fundamental business transaction would apply to the meeting in which the fundamental business transaction is to be approved.[287] Additionally, the provisions for record dates for establishing owners entitled to vote on the fundamental business transaction or to execute a written consent to approve the fundamental business transaction would also apply.[288] Care must be taken that the separate Chapters governing the approval procedures for fundamental business transactions of each different type of entity do not contain additional or conflicting requirements.

E. Chapter 8 Indemnification and Insurance. Chapter 8 of the Code contains provisions relating to certain kinds of domestic entities and organizations, which are referred to in the Chapter as "*enterprises*." The Chapter specifies the requirements and limitations on indemnification of governing persons, officers, and agents of an enterprise. The definition of "*enterprise*" specifically includes any predecessor domestic entity or organization, whether by way of merger, conversion, consolidation or other transaction in which the liabilities of the predecessor enterprise are transferred or allocated to the enterprise by operation of law or by assumption of the liabilities of the predecessor enterprise.[289]

F. Chapter 9 Foreign Entities. Chapter 9 of the Code contains several provisions that will apply to foreign entities engaged in fundamental business transactions. A foreign filing entity may amend its application for registration to disclose a change that results from a conversion from one type of foreign filing entity to another type of foreign filing entity or a

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284 *Id*. § 5.2011(a).

285 *Id*. at (b).

286 *Id*. §§ 5.201(b), 5.2011(b).

287 *See id*. §§ 6.051–6.053.

288 *See id*. §§ 6.101, 6.102.

289 *Id*. § 8.001(2), (7).

merger into another foreign filing entity.[290] In either case, the foreign filing entity making the amendment succeeds to the registration of the original foreign filing entity.[291] Section 9.012 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 no longer needs to be filed because the filing of the certificate of conversion sufficiently indicates the status of the converting foreign entity. The provision also applies to a conversion and continuance transaction under Section 10.1025.[292]

As a general rule, if the existence of a foreign filing entity or foreign limited liability partnership registered in Texas terminates because of dissolution, termination, merger, conversion or other circumstances, a certificate by an authorized governmental official of the entity's jurisdiction of formation that evidences the termination must be filed with the Texas Secretary of State.[293]

[290] *Id*. § 9.009(a-1).

[291] *Id*.

[292] *Id*. § 9.012.

[293] *Id*. § 9.011(d).