2019 TEXAS LEGISLATIVE UPDATE ON AMENDMENTS TO ENTITY LAWS

BY: DARYL B. ROBERTSON, *Dallas*
Hunton Andrews Kurth LLP

TABLE OF CONTENTS

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I. Introduction

This article summarizes several pieces of legislation that have been passed by the Texas Legislature in its 2019 Regular Session and that amend the Texas Business Organizations Code (the "*TBOC*") and the Texas Business and Commerce Code (the "*TBCC*"). There are many other bills that were passed affecting business law, so this article should not be viewed as containing a listing of business-related bills. The article contains summaries only and should not be relied on as a complete description of any bill or portion thereof.

Senate Bill No. 1859 ("*SB 1859*") was authored by Senator Kelly Hancock, sponsored by Representative Trey Martinez Fischer and became effective on September 1, 2019. SB 1859 made several technical and substantive amendments to the TBOC relating to partnerships, limited liability companies, electronic data systems and delayed effectiveness of filings.

Senate Bill No. 1969 ("*SB 1969*") was authored by Senator Kelly Hancock, sponsored by Representative Trey Martinez Fischer, and became effective on September 1, 2019. SB 1969 has provisions modeled on the provisions of the TBOC applicable to for-profit corporations to establish procedures for the ratification of void or voidable acts of a non-profit corporation.

Senate Bill No. 1971 ("*SB 1971*") was authored by Senator Kelly Hancock, sponsored by Representative Trey Martinez Fischer, and became effective on September 1, 2019. SB 1971 made several technical and substantive amendments to the TBOC relating to corporations, voting agreements and mergers.

House Bill No. 3609 ("*HB 3609*") was authored by Representative Trey Martinez Fischer, sponsored by Senator Kelly Hancock, and became effective on September 1, 2019. HB 3609 made substantive amendments to the provisions relating to assumed name certificates contained in the TBCC.

House Bill No. 3603 ("*HB 3603*") was authored by Representative Trey Martinez Fischer, sponsored by Senator Kelly Hancock, and became effective on September 1, 2019. HB 3603 amended the TBOC provisions relating to derivative proceedings of for-profit corporations, limited liability companies and limited partnerships.

Unless otherwise indicated, all references to a "Chapter," "Section" or "Subsection" are to a Chapter, Section or Subsection of the TBOC or TBCC, as applicable.

II. Assumed Name Filings

The TBCC was amended by HB 3609 to provide that an assumed name certificate for a domestic or foreign filing entity or certain other entities need only be filed with the office of the Secretary of State.[2] The filing of an assumed name certificate with the office of the county clerk of the county in which is located such entity's registered office or principal place of business in Texas is no longer required. The amendments modernized and aligned Texas assumed name filing statutes to conform with other states. It

[1] The author is a partner in the Dallas, Texas office of Hunton Andrews Kurth LLP. The author would like to acknowledge the contributions of Richard A. Tulli of Foley Gardere LLP, Carmen Flores and Brianna Godbey of the Office of the Texas Secretary of State, and Professor Elizabeth Miller of Baylor Law School.

[2] TEX. BUS. & COM. CODE ANN. § 71.103(a) (West, 2019), *amended by* Tex. H.B. 3609 §§ 1, 2, 86th Leg., R.S. (2019); TEX. BUS. & COM. CODE ANN. §§ 71.103(b), (c) and 71.104(b), *repealed by* Tex. H.B. 3609 §§ 1, 2.

is believed that Texas was, prior to these amendments, one of only two states in the U.S. (the other being Virginia) that generally had a dual filing requirement at the state and local level for assumed name filings for filing entities. Local county filings are no longer needed in this internet age because filings of assumed name certificates are available to the public online from the website of the Secretary of State. County level filings of assumed name certificates continue to be required for joint ventures, general partnerships, real estate investment trusts, estates and sole proprietors, for which other kinds of filings are not made with the Secretary of State.[3]

III. Authorizing Use of Electronic Data Systems

SB 1859 added a definition of "electronic data system" to Chapter 1 of the TBOC and amended the definition of "electronic transmission" to authorize the use of distributed electronic networks or databases in maintaining entity records. These networks or databases can include blockchain or distributed ledger technology. Another change amended the definition of "shareholder" to clarify that share transfer records can be maintained "on behalf of" a for-profit corporation, professional corporation or real estate investment trust.[4] The prior language could have been erroneously construed to not authorize an entity to use third-party transfer agents or electronic data systems to maintain share transfer records. In a similar theme, the requirement that a current record of the name and mailing address of each owner and member of a domestic filing entity be retained at the entity's registered office or principal place of business or at the office of its transfer agent or registrar was eliminated, although it must still be kept by or on behalf of the entity. Other revisions clarified that the books, records, minutes and ownership or membership records of any filing entity may be maintained by or on behalf of the filing entity through any information storage device, method, or one or more electronic data systems so long as such records can be converted into written paper form within a reasonable time.[5] Another small change clarified that an electronic transmission of a consent by an owner, member or governing person can be transmitted on behalf of such owner, member or governing person.[6]

SB 1971 added to TBOC Chapter 21 a definition of "share transfer records" maintained by or on behalf of a for-profit corporation, which is a phrase that has been previously used in the TBOC without a definition. The new definition recognizes electronic record-keeping. In accordance with pre-existing requirements, these records must contain a record of the names of all of the corporation's shareholders of record, the address and number of shares registered in the name of each such shareholder and all issuances and transfers of shares of the corporation.[7] Another amendment specified that, for annual meetings of shareholders, the required alphabetical list of shareholders can be maintained on a reasonably accessible electronic data system. Other language was revised to clarify that the alphabetical list of shareholders entitled to vote at the shareholders meeting can be prepared on behalf of the corporation.[8] The prior language could have been erroneously construed to not authorize a corporation to use third-party transfer agents or electronic data systems to prepare the list. Other amendments revised language that might have been construed to require specified notices to be sent only by a public benefit corporation. The revised language allowed the notices to be given instead by a third-party transfer agent or by means of an electronic data system.[9]

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[3] *See* TEX. BUS. & COM. CODE ANN. §§ 71.051-71.054 (West, 2009).
[4] TEX. BUS. ORGS. CODE ANN. §1.002 (20-a) (West, 2019), *added by* Tex. S.B. 1859 §1, 86th Leg., R.S. (2019); TEX. BUS. ORGS. CODE ANN. §1.002 (20-b), (81), *amended by* Tex. S.B. 1859 §1.
[5] *Id.* § 3.151(a) and (b), *amended by* Tex. S.B. 1859 §2.
[6] *Id.* § 6.205(b), *amended by* Tex. S.B. 1859 §7.
[7] *Id.* § 21.002 (10-a), *added by* Tex. S.B. 1971 §5, 86th Leg., R.S. (2019).
[8] *Id.* § 21.972(a), *amended by* Tex. S.B. 1971 §7.
[9] *Id.* §§ 21.953(c) and 21.955(b), *amended by* Tex. S.B. 1971 §§ 14, 15.

TBOC Section 22.002 was revised by SB 1971 to authorize meetings of members, directors and any committees of a nonprofit corporation to be held by means of a conference telephone or other similar communications equipment or another suitable electronic communication system, or any combination, as authorized in TBOC Section 6.002.[10] These changes clarified the authority of a nonprofit corporation to use the specified technology for meetings in a manner similar to the authorization provided for other domestic entities.

SB 1859 clarified that the books and records required to be maintained by a limited liability company or limited partnership may be maintained in any form and manner permitted under TBOC Section 3.151(b).[11] Accordingly, the records may be maintained by means of one or more electronic data systems. In addition, another revision clarified that the records of a limited partnership do not have to be maintained at the principal office of the limited partnership, but simply can be made available at that office.[12] This change allowed the limited partnership to use modern electronic data storage methods for maintaining records.

Amendments also clarified that a notice of issuance or transfer of an uncertificated ownership interest in a domestic entity can be sent by electronic transmission. Other changes clarified that the notice does not have to be actually sent by the domestic entity.[13] The prior language could have been erroneously construed to not authorize the notice to be sent by a transfer agent or by means of electronic transmission on behalf of the entity.

IV. Delayed Effectiveness of Filings

SB 1859 clarified that the effectiveness of a filing instrument may be delayed to a specific date or a specific date and time. The amendments also afford greater flexibility in specifying the effectiveness of a filing instrument that is conditioned upon the occurrence of a future event or fact. As amended, a filing instrument is permitted to take effect not only upon the occurrence of a specified future event or fact, but also upon a specified date, upon a specified date and time, or after the passage of a specified period of time, in each case after the occurrence of a specified future event or fact.[14] Conforming amendments required that a filing instrument that takes effect on a delayed basis must clearly and expressly state: (a) the specified date or the specified date and time at which the instrument takes effect, or (b) if the instrument takes effect on or after the occurrence of a future event or fact, such future event or fact that will cause the instrument to take effect and when the filing instrument takes effect, if the instrument takes effect after the occurrence of such future event or fact. Effectiveness of a filing instrument continues not to be allowed to be delayed later than the 90th day after the date the instrument is signed.[15]

Conforming amendments to other provisions were also made. The provisions requiring a subsequent statement to be filed not later than the 90th day after the date the filing instrument is filed were amended in a conforming manner to specify that if the filing instrument was to take effect after the occurrence of a specified future event or fact, the statement must state the date, or the date and time, at which the filing instrument took effect.[16] Other conforming amendments were made to the provisions

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[10] *Id.* § 22.002, *amended by* Tex. S.B. 1971 § 17.
[11] TEX. BUS. ORGS. CODE ANN. § 101.501(d), *added by* Tex. S.B. 1859 § 9, 14, 86th Leg., R.S. (2019); TEX. BUS. ORGS. CODE ANN. § 153.551(b), *amended by* Tex. S.B. 1859 § 9, 14.
[12] TEX. BUS. ORGS. CODE ANN. § 153.551(c), *amended by* Tex. S.B. 1859 § 14.
[13] *Id.* § 3.205(a) and (c), *amended by* Tex. S.B. 1859 § 3.
[14] *Id.* §§ 4.052, 4.054, *amended by* Tex. S.B. 1859 § 4.
[15] *Id.* § 4.053, *amended by* Tex. S.B. 1859 § 4.
[16] *Id.* § 4.055, *amended by* Tex. S.B. 1859 § 4.

specifying the result of the failure to file the subsequent statement as well as what happens if the future event or fact never occurs and is not waived.[17]

V. Derivative Proceedings

Rationalizing Provisions Across Entity Types. The prior provisions governing derivative proceedings in the TBOC for limited partnerships, limited liability companies and for-profit corporations were derived from the prior statutes that governed those types of entities. Accordingly, the derivative proceeding provisions governing limited partnerships were completely different from the derivative proceeding provisions governing limited liability companies and for-profit corporations, and those provisions governing limited liability companies and for-profit corporations were similar to each other.[18] As a policy matter, there is no good reason for the derivative proceeding provisions in the TBOC for limited partnerships to be different from those for limited liability companies. Accordingly, the primary purpose of the amendments in HB 3603 was to make similar the derivative proceedings provisions governing for-profit corporations, limited liability companies and limited partnerships.

Exception for Entities Having Less Than 35 Owners. The TBOC, prior to these amendments, contained an exception for limited liability companies and for-profit corporations with 35 or fewer owners to most of the conditions to a derivative proceeding, regardless of the nature of the claim being made in the proceeding.[19] The amendments in HB 3603 narrowed this exception based on the claim being made. Under the prior provisions, a single minority owner of a limited liability company or for-profit corporation to which the exception applied could have attempted to file a derivative action on behalf of the entity for any purpose, including, for example, an action against a counterparty on a contract or to collect an indebtedness. There is no good policy reason why a single owner should be permitted to force those kinds of derivative proceedings on the entity where there is no conflict involving management or other owners of the entity. Accordingly, the amendments revised the exception to limit the actions for which a member or shareholder can file a derivative proceeding on behalf of the limited liability company or for-profit corporation to claims or actions against managers, directors, officers or other members or shareholders of the entity.[20] In a substantive change, a similar exception was included in the new provisions governing derivative proceedings for limited partnerships that have 35 or fewer limited partners, with the exception applying to claims against a general partner, limited partner or officer of the limited partnership.[21]

No Demand Futility Exception for Limited Partnerships. The demand futility exception contained in the prior provisions for limited partnerships was eliminated by the amendments.[22] If the 35-or-fewer-limited-partner exception does not apply, any derivative proceeding on behalf of the limited partnership by a limited partner must comply with the requirements to notify the limited partnership and allow a determination to be made by the disinterested and independent general partners as to whether the limited partnership should pursue the claim.[23]

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[17] *Id.* § 4.056, *amended by* Tex. S.B. 1859 § 4.

[18] The former derivative proceeding provisions for: (a) partnerships were contained in Sections 153.401-153.405, Subchapter I of TEX. BUS. ORGS. CODE ANN. Chapter 153, (b) for-profit corporations were contained in Sections 21.551-21.563, Subchapter L of TEX. BUS. ORGS. CODE ANN. Chapter 21, and (c) limited liability companies were contained in Sections 101.451-101.463, Subchapter J` of TEX. BUS. ORGS. CODE ANN. Chapter 101.

[19] TEX. BUS. ORGS. CODE ANN. §§ 21.563, 101.463.

[20] *Id.* §§ 21.563, 101.463, *amended by* Tex. H.B. 3603 §§ 12, 14, 86th Leg., R.S. (2019).

[21] *Id.* § 153.413, *added by* Tex. H.B. 3603 § 30.

[22] *See* TEX. BUS. ORGS. CODE ANN. § 153.401(2).

[23] *Id.* §§ 153.401-153.404, *amended by* Tex. H.B. 3603 §§ 25-28.

Expansion to Assignees of Ownership Interests. HB 3603 added a new definition of "limited partner" for derivative proceedings of limited partnerships that includes assignees of limited partners.[24] The definition of "member" for derivative proceedings of limited liability companies was also expanded to include assignees of membership interests.[25] Assignees have an economic interest in the limited partnership or limited liability company to protect, and any assignee's attempt to file a lawsuit on behalf of the entity should be subject to the same conditions and restrictions as a full limited partner or member. Beneficial owner concepts are already recognized in the derivative proceeding provisions applicable to for-profit corporations and limited liability companies.[26] The inclusion of the assignee concept was not a substantial change as a result.

Multi-Level Entity Governance Structure. Provisions were added that clarify how a determination of disinterested and independent governing persons to pursue a derivative claim on behalf of a limited partnership or limited liability company is to be accomplished where (i) any governing person is an entity, or (ii) there are one or more other entities that own a governing person entity of the limited partnership or LLC. In these situations, there needs to be clear guidance that the determination is to be made by disinterested and independent individuals acting as direct or indirect governing persons of the underlying limited partnership or LLC.[27]

Application to Foreign Entities. HB 3603 clarified the application of the specified procedures and requirements to foreign limited liability companies and corporations. The TBOC provisions governing derivative proceedings prior to these amendments contained scattered references to "domestic or foreign" which created confusion as to whether those references were intended to supersede the particular section that specified what provisions applied, and how they applied, to foreign limited liability companies or corporations.[28] The sections that specified which provisions apply to foreign corporations or foreign limited liability companies were also amended to clarify that the procedural provisions relating to a court stay of a derivative proceeding are to be governed by the Texas provisions unless applying the laws of the jurisdiction of formation of the foreign corporation or limited liability company requires otherwise.[29]

VI. Voting Agreements

SB 1971 revised Section 6.252 of the TBOC governing voting agreements. The amendments clarified that the voting agreements addressed in this section are those separate from the domestic entity's governing documents.[30] The deposit of a copy of the voting agreement with the domestic entity has been revised from mandatory to permissive.[31] This provision was a formality that is not necessary because the parties to the agreement should retain copies.

The amendments clarified the basic rule that a voting agreement is specifically enforceable in writing against an owner who either executes it or acknowledges in writing that the owner or the ownership interest is subject to it.[32] Other changes clarified the circumstances in which a voting agreement is specifically enforceable against a subsequent owner of the ownership interest, when a subsequent owner is deemed to have notice of a voting agreement, and when the voting agreement becomes specifically

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[24] *Id.* § 153.401, *amended by* Tex. H.B. 3603 § 25.
[25] *Id.* § 101.451, *amended by* Tex. H.B. 3603 § 13.
[26] *See* TEX. BUS. ORGS. CODE ANN. §§ 21.551(2), 101.451(2).
[27] *Id.* §§ 101.451(2), 101.454(b), 153.404(b), *added by* Tex. H.B. 3603 §§ 13, 16, 28.
[28] *See*, *e.g.*, TEX. BUS. ORGS. CODE ANN. §§ 21.555(a), (b), 21.561, 101.455(a), (b), 101.461, *amended by* Tex. H.B. 3603 § 5, 10, 17, 22.
[29] TEX. BUS. ORGS. CODE ANN. §§ 21.562(a) and 101.462(a), *amended by* Tex. H.B. 3603 §§ 11, 23.
[30] *Id.* § 6.252(a), *amended by* Tex. S.B. 1971 § 1, 86th Leg., R.S. (2019).
[31] *Id*. § 6.252(b), *amended by* Tex. S.B. 1971 § 1.
[32] *Id*. § 6.252(c), *amended by* Tex. S.B. 1971 § 1.

enforceable against the subsequent owner. The voting agreement is specifically enforceable against a subsequent owner that (a) has notice or actual knowledge of the voting agreement at or before the time of transfer to the subsequent owner, (b) is not a transferee for value and receives notice or obtains actual knowledge of the voting agreement, or (c) acknowledges in writing that the subsequent owner or the ownership interest is bound by the voting agreement.[33] A subsequent owner is considered to have notice of the voting agreement if, at the time of transfer, the existence of the agreement is noted conspicuously on any certificate representing the ownership interest held by the transferor owner. This method of notice is not exclusive.[34] The voting agreement is specifically enforceable against the subsequent owner that is not a transferee for value from the time a subsequent owner first receives notice or obtains actual knowledge of the agreement.[35] The voting agreement that becomes specifically enforceable because the subsequent owner acknowledges in writing that fact is specifically enforceable from the time of the written acknowledgment.[36]

Another new provision clarified that Section 6.252 does not impair an entity's right to treat the record owner of the ownership interest as having the right to vote the ownership interest or to accept that owner's vote of the ownership interest.[37]

VII. Limited Liability Company Amendments

SB1859 deleted language in TBOC Section 101.302(c) that conflicted with other provisions of TBOC Chapter 101 that allowed the members of a limited liability company to remove managers without cause and to amend a company agreement. The deleted language, which indicated that the term of an incumbent manager could not be shortened by a decrease in the number of managers effected by an amendment to the company agreement, was similar to TBOC Section 21.403(c) regarding a director of a for-profit corporation, but was inconsistent with the powers afforded to members of a limited liability company to remove its managers.[38]

In 2017, the provisions of TBOC Section 101.503 were added to allow a member of a limited liability a right to recover the member's costs and expenses incurred in enforcing the member's rights to examine and copy the records of the company under TBOC Section 101.502. However, Section 101.502 also provides an assignee of a membership interest a similar right to examine and copy the records of the company. SB 1859 amended Section 101.503 by adding an assignee of a membership interest to those provisions allowing recovery of enforcement costs.[39]

Another amendment expanded the grounds permitting a district court to order the winding up of a series of a domestic limited liability company so that such grounds are similar to those for winding up the limited liability company itself under TBOC Section 11.314. The amendments confirmed that such grounds can include the economic purpose of the series is likely to be unreasonably frustrated or another member associated with the series is engaged in conduct that makes it unreasonably practicable to carry on the business of the series with that member.[40]

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[33] *Id*. § 6.252(c-1), *added by* Tex. S.B. 1971 § 1.
[34] *Id*. § 6.252(c-2), *added by* Tex. S.B. 1971 § 1.
[35] *Id*. § 6.252(c-3), *added by* Tex. S.B. 1971 § 1.
[36] *Id*. § 6.252(c-4), *added by* Tex. S.B. 1971 § 1.
[37] *Id*. § 6.252(g), *added by* Tex. S.B. 1971 § 1.
[38] *Id.* § 101.302(c), *amended by* Tex. S.B. 1859 § 8, 86th Leg., R.S. (2019).
[39] *Id.* § 101.503(a), *amended by* Tex. S.B. 1859 § 10.
[40] *Id.* § 101.621, *amended by* Tex. S.B. 1859 § 11.

VIII. Partnership Amendments

Claims Against Individual Partners. The TBOC provisions in existence prior to the amendments specifically allowed a creditor to proceed against one or more partners or the property of the partners to satisfy a judgment based on a claim against the partnership only if (a) a judgment is obtained against both the partner and the partnership and (b) the judgment against the partnership has not been reversed or vacated and remains unsatisfied for 90 days after the date on which the judgment was entered or the date in which the stay expires if the judgment is contested and the execution of the judgment is stayed.[41] Exceptions to the foregoing conditions included (1) if the partnership is a debtor in bankruptcy, (2) a court orders otherwise, (3) liability is imposed on the partner by law independently of the person's status as a partner, or (4) the creditor and the partnership agree that the creditor is not required to comply with those conditions.[42] SB 1859 clarified that these exceptions to the general rule are exceptions to all of the specified conditions with respect to the partnership's judgment. This clarification was prompted by *Lemon v. Hagood*, 545 S.W.3d 105 (Tex. App.—El Paso 2017, pet. denied), in which the court of appeals held that the exceptions are exceptions to the 90-day waiting period, but not to the requirement to obtain a judgment against the partnership. Section 152.306 was based on Section 3.05 of the Texas Revised Partnership Act. The drafters' comments to Section 3.05 of the Texas Revised Partnership Act indicated that the intent of Section 3.05 was for the exceptions to apply to the requirement that a judgment be obtained against the partnership as well as the requirement that the 90-day waiting period elapse.[43]

The amendments effected by SB 1859 first removed the confusing language indicating that a creditor may proceed against one or more partners. This language was not needed because one of the conditions was that the creditor must have already obtained a judgment against the partner. Accordingly, the creditor could proceed against the property of one or more partners to satisfy its judgment.[44] Another change clarified that the exceptions only apply to the conditions relating to the judgment against the partnership and the failure of the judgment to be satisfied for 90 days and does not apply to the condition to obtain a judgment against the partner against whose property the creditor is trying to make a claim.[45] Another change clarified that the exception for liability that is imposed on the partner by law independently of the person's status as a partner can also arise if the liability is imposed on the partner by contract.[46] One final change eliminated the ability of the partnership to waive the conditions with respect to its partners. As amended, unless another exception applies, a partnership creditor may not proceed directly against a partner on a claim against the partnership without satisfying the conditions applying to the partnership judgment absent an agreement by that partner.[47]

Indemnity of Withdrawn Partners. SB 1859 made clarifications and changes with respect to a partnership's obligation to indemnify a withdrawn partner whose interest is redeemed by the partnership (which is the consequence of withdrawal of a partner under the statute unless otherwise agreed). As amended, the provision eliminated potential confusion with regard to the scope of the current indemnification obligation. Consistent with the Revised Uniform Partnership Act and prior law in Texas under the Texas Uniform Partnership Act, the amended provision generally obligates a partnership to indemnify a withdrawn partner against all partnership obligations, whether incurred before or after withdrawal, except an obligation incurred by an act of the withdrawn partner under TBOC Section 152.504

[41] TEX. BUS. ORGS. CODE ANN. § 152.306(b).
[42] *Id.* § 152.306(c).
[43] *See* TEX. REV. CIV. STAT. ANN. art. 6132b-3.05 (expired) Comment of Bar Committee—1993 (explaining that "TRPA requires a judgment also against the partnership, with narrow exceptions in Section 3.05(e) [the predecessor to Section 152.306(c)]").
[44] TEX. BUS. ORGS. CODE ANN. § 152.306(b) and (c), *amended by* Tex. S.B. 1859 § 12.
[45] *Id*. § 152.306(c), *amended by* Tex. S.B. 1859 § 12.
[46] *Id*. § 152.306(c)(4), *amended by* Tex. S.B. 1859 § 12.
[47] *Id.* § 152.306(c)(2), *amended by* Tex. S.B. 1859 § 12.

(describing circumstances in which a withdrawn partner causes the partnership to incur a liability to a person who does not have notice that the withdrawn partner has ceased to be a partner and believes the withdrawn partner is still a partner).[48] The partnership and withdrawn partner are free to agree to different or more detailed indemnification provisions.

IX. Two-Step Offer–Merger Transactions

SB 1971 amended TBOC Section 21.459 principally to conform the provisions of the TBOC relating to two-step offer-merger transactions to recent changes in Section 251(h) of the Delaware General Corporation Law, which served as the original basis for these provisions in the TBOC. The amendments also conformed these mergers to the exceptions to dissenters' rights applicable to other types of mergers. The effect of the various amendments was to make this kind of merger transaction more available to potential acquirers. Among other things, the amendments clarified or provided that:

(1) the target corporation need have only one class or series of shares, and not all of its classes and series of shares, listed on a national securities exchange or held of record by more than 2,000 holders immediately before the corporation's board of directors approves the plan of merger[49];

(2) although the offer must be made to each class and series of outstanding shares of the target corporation, only shares within the same class or series of shares must receive the same consideration in the first-step offer and in the second-step merger[50];

(3) shares of the target corporation owned by the acquirer's wholly-owned subsidiaries and parent organization may be treated as owned by the acquirer in order to satisfy the minimum-ownership requirement to approve the merger[51];

(4) under specified conditions, "rollover shares" (as defined) may be treated as shares owned by the acquirer in order to satisfy the minimum-ownership requirement to approve the merger[52]; and

(5) in a departure from the corresponding Delaware provision, not only the acquirer, but also a "qualified affiliate" of the acquirer, may be the party to the second-step merger with the target corporation.[53]

The amendments added several new defined terms to Section 21.459. The newly defined phrase "qualified affiliate" means, with respect to the organization consummating an offer, any person that owns, directly or indirectly, all of the outstanding ownership interests of such organization or that is a direct or indirect wholly owned subsidiary of such organization or of any such parent person.[54] "Offer" is defined to mean a tender offer or an exchange offer that satisfies the requirements specified in the revised provisions, and this term is also specifically designated for use in various provisions in TBOC Section 10.355 and 10.356.[55] The new phrase "excluded shares" was introduced to describe the outstanding shares of the corporation that are not to be converted or exchanged in the merger. The defined phrase includes shares of the corporation that are owned at commencement of the offer by the corporation, the organization consummating the offer, any person that owns directly or indirectly all of the outstanding

[48] *Id.* § 152.606, *amended by* Tex. S.B. 1859 § 13.
[49] *Id.* § 21.459(c), *amended by* Tex. S.B. 1971 § 8, 86th Leg., R.S. (2019).
[50] *Id.* § 21.459(c)(2)(C), *added by* Tex. S.B. 1971 § 8.
[51] *Id.* § 21.459(c)(3), *amended by* Tex. S.B. 1971 § 8.
[52] *Id.*
[53] *Id.* § 21.459(c)(4), *amended by* Tex. S.B. 1971 § 8.
[54] *Id.* § 21.459(e)(2), *added by* Tex. S.B. 1971 § 8.
[55] *Id.* § 21.459(d)(3), *added by* Tex. S.B. 1971 § 8.

ownership interests of the organization consummating the offer, or any direct or indirect wholly owned subsidiary of the corporation, the organization consummating the offer or any other parent person of the organization consummating the offer. The phrase also includes rollover shares.[56] The defined phrase "rollover shares" means any shares of the corporation that are the subject of a written agreement, separate from the offer, requiring the shares to be transferred, contributed or delivered to the organization consummating the offer or any of the organization's qualified affiliates in exchange for ownership interest in the organization consummating the offer or a qualified affiliate of that organization.[57] Various clarifications were also made to the prior definition of "received" in respect of the consummation of the offer. These clarifications introduced the concept of executed letters of transmittal being received. Also, certificated shares that were canceled before the consummation of the offer and uncertificated shares to the extent reduced or eliminated due to any sale of those shares before the consummation of the offer cannot be considered received for purposes of the offer.[58]

The amendments also provided that the so-called "market-out" exception to dissenters' rights that applies to a regular merger under Subchapter A of Chapter 10 of Title 1 of the TBOC also applies to a second-step merger following an offer under Section 21.459(c). Correspondingly, the relevant date to determine whether the ownership interests of a for-profit corporation that is a party to such a merger were listed on a national securities exchange or held of record by at least 2,000 owners is the date the board of directors approves the plan of merger.[59] Other amendments, which apply more generally, clarified that fractional depository receipts in respect of ownership interests can be issued as part of the consideration under a plan of merger, conversion or exchange without affecting the so-called "market-out" exception to dissenters' rights.[60]

X. Ratification of Defective Corporate Acts by For-Profit Corporations

SB 1971 clarified several provisions governing ratification of defective corporate acts for for-profit corporations. The changes were intended to be similar to recent amendments made to the Delaware General Corporation Law, which served as the original basis for the provisions in Subchapter J of Chapter 21 of the TBOC. The amendments clarified the definition of "defective corporate act" by providing that the act or transaction purportedly taken by or on behalf of the corporation was within the power of the corporation to take under the corporate statute without regard to the identified failure of authorization.[61] The definition of "failure of authorization" was amended to include a failure to authorize or effect an act or a transaction in compliance with the disclosure set forth in any proxy or consent solicitation statement if and to the extent the failure would render the act or transaction void or voidable.[62] A definition of "putative record date" was added to mean the date with respect to any defective corporate act that involved the establishment of a record date for a meeting of or action by shareholders or any other purpose.[63]

The amendments clarified that the defective corporate act need not be submitted to shareholders for approval if, as of the record date for determining the shareholders entitled to vote on the ratification, there were no valid shares outstanding and entitled to vote thereon, regardless of whether there then existed any putative shares.[64] Notice of a shareholders' meeting need not be given to a holder of record of valid

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[56] *Id*. § 21.459(e)(1), *added by* Tex. S.B. 1971 § 8.
[57] *Id*. § 21.459(e)(4), *added by* Tex. S.B. 1971 § 8.
[58] TEX. BUS. ORGS. CODE ANN. § 21.459 (e)(3), *amended by* Tex. S.B. 1971 § 8; TEX. BUS. ORGS. CODE ANN. § 21.459(f), *added by* Tex. S.B. 1971 § 8.
[59] TEX. BUS. ORGS. CODE ANN. § 10.354(b)(1) and (c), *amended by* Tex. S.B. 1971 § 2.
[60] *Id*. §10.354(b)(3)(B) and (C), *amended by* Tex. S.B. 1971 § 2.
[61] *Id*. § 21.901(2), *amended by* Tex. S.B. 1971 § 10.
[62] *Id*. § 21.901(4), *amended by* Tex. S.B. 1971 § 10.
[63] *Id*. § 21.901(5-a), *added by* Tex. S.B. 1971 § 10.
[64] *Id*. § 21.905(2), *amended by* Tex. S.B. 1971 § 11.

shares and putative shares if the identity or address of that holder cannot be ascertained from the corporation's records as of the putative record date in the case of any defective corporate act that involved the establishment of a putative record date.[65] A notice of a shareholders' meeting required by TBOC Section 21.906(a)(2) is considered given by a corporation having shares listed on a national securities exchange if the information contained in the notice is disclosed in a document publicly filed with the Securities and Exchange Commission.[66]

XI. Ratification of Defective Corporate Acts by Nonprofit Corporations

SB 1969 amended the TBOC to add provisions that specify procedures for ratification of void or voidable corporate acts by nonprofit corporations, modeled on provisions of the TBOC applicable to for-profit corporations and similar provisions of the Model Nonprofit Corporation Act ("*MNPCA*"). A new Subchapter J was added to the TBOC.

Definitions. New definitions of "corporate statute," "defective corporate act," "district court," "failure of authorization," "time of the defective corporate act," and "validation effective time" were added that apply to Subchapter J.[67]

General Effect of Ratification or Court Validation. A defective corporate act is not void or voidable solely as a result of a failure of authorization if the act is ratified in accordance with Subchapter J or validated by the district court in a proceeding brought under Section 22.512 of Subchapter J.[68] The board and member ratification procedures and the court validation procedure under Subchapter J are not the exclusive means of ratifying or validating any defective corporate act.[69] The absence or failure of the ratification of an act or transaction in accordance with Subchapter J or a validation of an act or transaction by a district court under Subchapter J does not, of itself, affect the validity or effectiveness of any act or transaction properly ratified under common law or otherwise. Such absence or failure does not create a presumption that any such act or transaction is or was a defective corporate act.[70]

Ratification by Board. Ratification of the defective corporate act requires that the board of directors first adopt resolutions stating (a) the defective corporate act to be ratified, (b) the date of the defective corporate act, (c) the nature of the failure of authorization with respect to the defective corporate act to be ratified, and (d) that the board of directors approves the ratification of the defective corporate act.[71] The resolutions can cover more than one defective corporate act. If management of the affairs of the corporation is vested in its members, such members must adopt the foregoing resolutions.[72] Special quorum and voting requirements applicable to the adoption of the resolutions ratifying a defective corporate act are also contained in the amendments.[73]

Member Approval. If the corporation has members with voting rights, the defective corporate act must be submitted to such members for approval unless no provision of the corporate statute and no provision of the governing documents of the corporation or of any plan or agreement to which the corporation is a party would have required approval by such members of the defective corporate act to be

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[65] *Id.* § 21.906(a)(2), *amended by* Tex. S.B. 1971 § 12.
[66] *Id.* § 21.911(e)(2), *amended by* Tex. S.B. 1971 § 13.
[67] *Id.* § 22.501, *added by* Tex. S.B. 1969 § 1, 86th Leg., R.S. (2019).
[68] *Id.* § 22.502, *added by* Tex. S.B. 1969 § 1.
[69] *Id.* § 22.511(a), *added by* Tex. S.B. 1969 § 1.
[70] *Id.* § 22.511(b), *added by* Tex. S.B. 1969 § 1.
[71] *Id.* § 22.503(a), *added by* Tex. S.B. 1969 § 1.
[72] *Id.* § 22.503(c), *added by* Tex. S.B. 1969 § 1.
[73] *Id.* § 22.504, *added by* Tex. S.B. 1969 § 1.

ratified either at the time of the defective corporate act or at the time when the board adopts the required resolutions.[74]

The procedures for submission of the defective corporate act to members and the voting requirements are specified in detail. Notice of the time, place (if any) and purpose of the meeting must be given at least 20 days before the date of the meeting to each voting member as of the record date for the meeting. In addition, notice must be given to each voting member, as of the time of the defective corporate act, but such notice is not required to be given to a member whose identity or address cannot be ascertained from the corporation's records.[75] The notice must contain copies of the board resolutions or the information required by TBOC Section 22.503(a) to be included in such board resolutions. The notice must also contain a statement that, on member approval of the ratification of the defective corporate act, the member's right to challenge the defective corporate act is limited to an action claiming that a court of appropriate jurisdiction should declare that the ratification not take effect or take effect only on certain conditions if that action is filed with the court no later than 120 days after the validation effective time, or that the ratification was not accomplished in accordance with Subchapter J.[76]

The quorum and voting requirements for members at the meeting are the same as those applicable at the time of such approval by the members for the type of ratified defective corporate act to be approved.[77] The approval of a resolution to ratify the election of a director requires the affirmative vote of a majority of members present at the meeting and entitled to vote on the election of the director unless the governing documents of the corporation then in effect or in effect at the time of the defective election require or required a larger number of voting members or any class of voting members to elect the director, in which case the affirmative vote of such larger number of voting members or any class of voting members is required, except that the presence or approval of any class that is no longer in existence or has no members, or of any person that is no longer a member with voting rights, is not required.[78]

Certificate of Validation. The filing of a certificate of validation with the filing officer is required if the defective corporate act being ratified would have required the filing of a filing instrument or document with the filing officer.[79] The certificate of validation must include: (a) each defective act that is the subject of the certificate of validation, including the date of the defective act and the nature of the failure of authorization, (b) a statement that each defective act was ratified in accordance with Subchapter J, including the date of the board ratification and, if applicable, the date on which the voting members approved the ratification or, if the management of the affairs of the corporation is vested in its members, the date on which the members ratified the defective corporate act, and (c) as appropriate, a filing instrument as an attachment to the certificate of validation to correct any problems with a previously filed filing instrument or to effect the proper filing of a filing instrument that should have been filed in connection with the defective corporate act.[80] Any filing instrument attached to a certificate of validation does not need to be executed separately and does not need to include any statement required by any other provision of the TBOC that the filing instrument has been approved and adopted in accordance with that provision.[81] A separate certificate of validation is required for each defective act except that two or more defective

[74] *Id.* § 22.505, *added by* Tex. S.B. 1969 § 1.
[75] *Id.* § 22.506(a), *added by* Tex. S.B. 1969 § 1.
[76] *Id.* § 22.506(b), *added by* Tex. S.B. 1969 § 1.
[77] *Id.* § 22.507(a), *added by* Tex. S.B. 1969 § 1.
[78] *Id.* § 22.507(c), *added by* Tex. S.B. 1969 § 1.
[79] *Id.* § 22.508(a), *added by* Tex. S.B. 1969 § 1.
[80] *Id.* § 22.508(c), *added by* Tex. S.B. 1969 § 1.
[81] *Id.* § 22.508(d), *added by* Tex. S.B. 1969 § 1.

corporate acts may be included in a single certificate of validation if the corporation filed or could have filed a single filing instrument or other document under another provision of the TBOC to effect the acts.[82]

Effect of Ratification. On and after the validation effective time, the defective corporate act is no longer deemed void or voidable as a result of the failure of authorization retroactive to the time of the defective corporate act.[83]

Notice of Ratification to Members. A notice of the ratification must be given to all members having voting rights as of the date of the adoption of the ratifying resolution by the board of directors or the managing members.[84] The notice must also be given to each member having voting rights as of the time of the defective corporate act, except that such notice is not required to be given to a member whose identity or address cannot be ascertained from the corporation's records.[85] The required contents of the notice are specified.[86] The foregoing notice is not required if notice of the ratification is given in accordance with procedures for member approval of the ratification as described above.[87]

Validation Procedures for a District Court. A corporation, any successor entity to the corporation, any member of the board of directors, any member with voting rights, any record member with voting rights as of the time a defective corporate act was ratified in accordance with Subchapter J, or any other person claiming to be substantially and adversely affected by a ratification under Subchapter J may apply to a district court, pursuant to new Section 22.512, to determine the validity and effectiveness of various matters relating to any defective corporate act or transaction or to modify or waive any of the procedures set forth in Subchapter J to ratify a defective corporate act.[88] Actions that the district court may take as a result of the application include ordering the filing officer to accept an instrument for filing with a prior effective date and time, and validating and declaring effective any defective corporate act, among other things.[89] New Subsection 22.512(d) specifies various factors for the district court to consider in connection with the resolution of matters.

The district court is vested with exclusive jurisdiction to hear and determine all actions brought under Section 22.512.[90] An action claiming that a defective corporate act is void or voidable due to a failure of authorization that has been ratified under Subchapter J may not be filed in or must be dismissed by any court after the applicable validation effective time, and an action claiming that a court should declare that a ratification under Subchapter J not take effect or that the ratification take effect only on certain conditions may not be filed with the court after the expiration of 120 days after the later of the validation effective time or the time that any notice of the ratification required to be given under Section 22.510 is given.[91] These restrictions do not apply to an action asserting that a ratification was not accomplished in accordance with Subchapter J or to any person to whom notice of ratification was not given as required by Sections 22.506 and 22.510.[92]

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[82] *Id.* § 22.508(b), *added by* Tex. S.B. 1969 § 1.
[83] *Id.* § 22.509, *added by* Tex. S.B. 1969 § 1.
[84] *Id*. § 22.510(a), *added by* Tex. S.B. 1969 § 1.
[85] *Id*. § 22.510(c), *added by* Tex. S.B. 1969 § 1.
[86] *Id*. § 22.510(d), *added by* Tex. S.B. 1969 § 1.
[87] *Id*. § 22.510(e), *added by* Tex. S.B. 1969 § 1.
[88] *Id*. § 22.512(a) and (b), *added by* Tex. S.B. 1969 § 1.
[89] *Id*. § 22.512(c), *added by* Tex. S.B. 1969 § 1.
[90] *Id*. § 22.513, *added by* Tex. S.B. 1969 § 1.
[91] *Id*. § 22.515(b), *added by* Tex. S.B. 1969 § 1.
[92] *Id*. § 22.515(a), *added by* Tex. S.B. 1969 § 1.

XII. Directors of Nonprofit Corporation

SB 1971 added a definition of "director" of a nonprofit corporation to mean any person who is a voting member of the board of directors regardless of the name or title used to designate the person. Also, a person is not considered to be a "director" of a nonprofit corporation under TBOC Chapter 22 if the person is not entitled to vote as a director even if the person is designated as an ex-officio, honorary or other type of director of the corporation.[93] Unneeded language relating to ex-officio members of a board of directors of a nonprofit corporation was eliminated in various other provisions, because the substance of those provisions was replaced by the new definition of "director". The revised provisions also clarified that the certificate of formation or bylaws of a nonprofit corporation may provide that a person who is not a director has the right to receive notice of or to attend meetings of the board, but that right does not cause the person to have the authority, duties or liabilities of a director or be deemed to be a governing person of the corporation.[94]

XIII. Notice of Redemption by For-Profit Corporation

SB 1971 clarified that the allowed time period for sending of a notice of redemption by a for-profit corporation to holders of its redeemable shares can be specified in the terms of the series or class of shares in lieu of the time period specified in the existing provisions, which is between 21 and 60 days prior to the redemption date.[95] This time period restriction previously caused some problems with legitimate redemption transactions that could have been effected on a quicker timeframe pursuant to the terms of the applicable redeemable shares.

XIV. Other Bills of Interest

HB 1159, which was authored by Representative Price and sponsored by Senator Watson, amended the Civil Practice and Remedies Code to add an approved statutory short form of acknowledgment for a limited liability company as well as adding an explanation of what "acknowledged" means in respect of a limited liability company. LLCs were not addressed in the prior statutory provisions.[96] In addition, the prior language applicable to a partnership was expanded to contemplate authorized officers and agents of the partnership as being authorized to provide an acknowledgment.[97] This bill became effective September 1, 2019.

SB 1258, which was authored by Senator Buckingham and sponsored by Representative Moody, amended the Penal Code to add limited liability companies and other entities or organizations governed by the TBOC into the definition of "person" in Section 1.07 and 20.01 of the Penal Code.[98] Various other provisions relating to criminal responsibility and authorized criminal punishment were expanded to apply to limited liability companies and other entities or organizations governed by the TBOC.[99] The prior provisions were literally limited to "corporations or associations", and there had been uncertainty as to whether LLCs and other kinds of entities or organizations governed by the TBOC could be subjected to

[93] TEX. BUS. ORGS. CODE ANN. § 22.001 (3-a), *added by* Tex. S.B. 1971 § 16, 86th Leg., R.S. (2019).
[94] *Id.* §§ 22.210 and 22.356(b), *amended by* Tex. S.B. 1971 §§ 18, 19.
[95] *Id.* § 21.305(b), *amended by* Tex. S.B. 1971 § 6.
[96] TEX. CIV. PRAC. & REM. CODE ANN. §§121.006(b)(6), 121.008(b)(6) (West, 2019), *added by* Tex. H.B. 1159 §§ 1, 2, 86th Leg., R.S. (2019).
[97] *Id.* §§ 121.006(b)(3), 121.008(b)(3), *amended by* Tex. H.B. 1159 §§ 1, 2.
[98] TEX. PENAL CODE ANN. §§ 1.07(a)(38), 7.21(1) (West, 2019), *amended by* Tex. S.B. 1258 §§ 1, 2, 86th Leg., R.S. (2019).
[99] *Id.* §§ 7.21, 7.22, 7.23, 7.24, 12.51, 20.01(4), 32.43(e), *amended by* Tex. S.B. 1258 §§ 1-5.

criminal prosecution. This bill became effective September 1, 2019 and only applies to offenses that occur after that date.[100]

[100] *Id*., *amended by* Tex. S.B. 1258 § 6.