

# Lawyer Insights

## Business Law

By Daryl Robertson

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This article summarizes several bills passed by the 88th Texas Legislature that affect business law and does not purport to describe all passed bills in this area. This article contains summaries only and should not be relied on as a complete description of any bill. All bills are effective September 1, 2023, unless otherwise noted.

### **Omnibus Package of TBOC Amendments**

**SB 1514** makes an array of amendments to the Texas Business Organizations Code, or TBOC, covering various topics. Most of these amendments are summarized below.

*Omission of Initial Mailing Address in Restated Certificate of Formation.* The amendments permit omission of an entity's initial mailing address, which can become inaccurate as time passes, in a restated certificate of formation. The 2021 Texas Legislature added a requirement that the initial certificate of formation of a domestic filing entity must include its initial mailing address.

*Delayed Effective Date for Certificate of Merger, Conversion, or Exchange.* Several changes enhance the flexibility to file a certificate of merger, exchange, or conversion with a delayed effective date. The changes delete unnecessary language in several TBOC provisions requiring that a certificate of merger, exchange, or conversion must be filed after the approval of the related plan of merger, exchange, or conversion. Similarly, unnecessary language restricting the filing of a certificate of conversion or merger for a series of a limited liability company to after adoption of the related plan of conversion or merger has been deleted.

*Dissent and Appraisal Rights Changes.* A notice of a meeting of owners who have dissent and appraisal rights must include a copy of the dissent and appraisal provisions of TBOC Chapter 10. As an alternative to a copy, the amendment allows the notice to direct owners to a publicly available electronic resource where those provisions may be accessed without cost. The requirement that dissenting owners must surrender an endorsed certificate representing their ownership interests in order to obtain payment of the appraisal proceeding judgment is replaced by a statement that the judgment must be paid on terms and conditions ordered by the court.

*Replacement of LLC's Last Member.* Greater flexibility is provided for continuing the existence of a Texas LLC upon the termination of the member status of the last remaining member. Among other things, the default deadline for the replacement of that member is extended from 90 days to one year after the date of termination of the last member to continue the LLC's existence. The company agreement can substitute any other period of time as the applicable deadline. The concept of a "springing" member is also confirmed by a new provision.

*Reinstatement and Continuation of Terminated Entities or LLC Series.* The three-year deadline for reinstatement of a voluntarily terminated domestic entity is eliminated. The provisions allowing continued existence for limited purposes of a terminated filing entity are clarified to apply also to a

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termination under the Tax Code or any chapter of the TBOC. Also, reinstatement of a terminated LLC under the TBOC or the Tax Code automatically reinstates any protected series or registered series that terminated because of the termination.

*Availability of Lists of Shareholders and Voting Members at Corporate Meetings.* The requirements for a list of shareholders or voting members of a for-profit or nonprofit corporation to be produced and kept available for inspection at meetings of the shareholders or voting members are eliminated. Other provisions continue to require the list to be made available for inspection before the meeting.

*Ratification of Void or Voidable Acts by Partnerships or LLCs.* New provisions clarify that a limited liability company or partnership can ratify an act or transaction that was void or voidable when taken, or can waive compliance with any requirements of the company agreement or partnership agreement that caused an act or transaction to be void or voidable.

*Doctrine of Independent Legal Significance.* A new provision clarifies that an action validly taken under a provision of the TBOC may not be considered invalid because it is identical or similar in substance to an action that could have been taken under another provision of the TBOC but fails to satisfy the requirements of that other provision.

*Electronic Signature on Certificated Ownership Interests.* An ownership interest certificate can now contain the electronic or digital signatures of authorized managerial officials. *Certificates of Existence for Registered Series.* A certificate issued by the secretary of state stating that a domestic registered series is in existence may be relied on as conclusive evidence of the existence of the series.

*Issuance of Shares, Rights, and Options.* The amendments clarify and harmonize various provisions relating to authorizations by the board of directors for the issuance of shares, and of rights and options to purchase shares, by for-profit corporations and the power to delegate to other persons the authority to determine various matters relating to such issuances.

*Inspection Rights of Owners.* Various provisions relating to the rights of owners to examine and copy records of for-profit corporations, limited partnerships, and limited liability companies are clarified and harmonized.

*Certificate of Registered Series.* A change clarifies that a certificate of registered series must be amended if the name of the associated LLC changes.

*Company and Partnership Agreements.* Amendments clarify what writings constitute a company or partnership agreement and that the entity, its owners, and any assignees are bound by such agreement regardless of whether they sign the agreement.

*Divisive Merger of LLC Series.* The definition of "merger," for purposes of series of LLCs, is clarified to include a divisive merger whereby there is a surviving merging series and one or more new protected series or registered series.

*Return of Distribution by Limited Partner or LLC Member.* A change clarifies that an LLC member or a limited partner can be obligated to return an illegal distribution by the entity under another agreement.

*Management of LLC by Governing Authority.* An amendment clarifies that the governing authority of an LLC shall direct the management of the business and affairs, and exercise or authorize the exercise of the powers, of the LLC as provided by the company agreement and the TBOC.

*Notices for Written Consents.* Changes clarify that owners or members of an entity can take action via a non-unanimous written consent without providing prior notice. For LLCs, such consent does not require prior or subsequent notice.

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*Assumed Name Certificates.* The definition of "assumed name" in the Texas Business & Commerce Code is amended to confirm that a protected series of an LLC does not have an assumed name if its name includes the name of its associated LLC. The definition of "office" is amended to be; for a non-individual, that person's principal office in Texas or outside Texas, as applicable.

### **LLC Charging Orders**

**SB 2314** clarifies that both single-member and multiple member LLCs are subject to the provisions limiting the remedies of a member's judgment creditor to a charging order against that member's membership interest.

### **Public Inspection of Records of Texas Nonprofit Corporations**

**HB 1957** amends TBOC Section 22.353 to require only a Texas nonprofit corporation that is an exempt organization under Internal Revenue Code Section 501(c)(3) to keep each document it is required to make available for public inspection under such code at its registered or principal office in Texas for three years after the close of the fiscal year. The nonprofit corporation must make such documents available to the public for inspection and copying at its registered or principal office during regular business hours. As a result of the amendments, the prior requirement that all Texas nonprofit corporations make available for public inspection their records, books, and annual reports for three years no longer exists.

### **New Texas Business Court**

Many business lawyers are extremely interested in **HB 19**, which establishes the Texas business court. The court will start taking cases after September 1, 2024. For further details, see the summary under "Civil Litigation and Appellate Law" and the summary under "Texas Judiciary."

### **Electronic Trading Platforms for Digital Assets**

**HB 1666** prohibits electronic trading platforms for digital assets from commingling customer funds with funds belonging to the platform, using customer funds to secure a transaction other than a transaction for such customer, or maintaining customer funds in such a manner that the customer is unable to fully withdraw the customer's funds. The new provisions apply to an electronic platform that holds a money transmission license and either serves more than 500 customers in Texas or has at least \$10 million in customer funds.

### **Regulatory Bills**

**SB 1646** makes several minor revisions to Finance Code provisions regulating state trust companies, effective May 19, 2023; **HB 3574** makes several minor revisions to Finance Code provisions regulating state banks, effective June 18, 2023. **SB 895** adds new extensive Finance Code provisions based largely on the Model Money Transmission Modernization Act. New Chapter 152 adds regulatory provisions for money transmission businesses and imposes licensing requirements.

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