

BILL ANALYSIS

H.B. 1156
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Business & Industry
Committee Report (Unamended)

BACKGROUND

The Business Organizations Code (the "Code") is 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 also has assisted in the drafting of the Code. The Code has been under development since 1995. The Code was introduced as H.B. 2681 in the 1999 Texas Legislature and as H.B. 327 in the 2001 Texas Legislature. Both bills were passed by the House Business & Industry Committee but were never set on the House Calendar in either session by the House Calendars Committee. With some inter-session changes, this bill is essentially the same as H.B. 2681 and 327. The Code was also the subject of an Interim Report of a subcommittee of the House Business & Industry Committee.

Section 323.007, Government Code requires the systematic revision and reorganization of Texas statutes into codes. A new code revising and reorganizing Texas statutes governing for-profit and non-profit, private-sector entities has not yet been enacted. The codification process involves reclassifying and rearranging the statutes in a more logical order, emphasizing a numbering system and format that will accommodate future expansion of the law, eliminating repealed, invalid, duplicative and other ineffective provisions, and improving the draftsmanship of the law if practicable. These efforts are carried out to make the statutes more accessible, understandable and useable.

The Code differs from the normal, non-substantive codification by the Legislative Council because, when compared to existing law, substantive changes have been made in the Code. Several of the code projects in the past (for example, the Election Code, the Tax Code, the Penal Code, the Education Code and the Transportation Code) have contained substantive revisions and were prepared to a great extent by parties other than the Legislative Council. This same process has been followed in the drafting of the Code. While for the most part the Code represents a nonsubstantive codification of existing statutes, substantive improvements have been made to effect the additional goals of modernizing, simplifying and standardizing provisions, procedures and filings. These goals are consistent with the objectives of a standard codification project where no substantive changes are made.

Unless otherwise noted, the provisions of this Code are nonsubstantive revisions of comparable provisions found in the Texas Business Corporation Act ("TBCA"), Texas Non-Profit Corporation Act ("TNPCA"), Texas Miscellaneous Corporation Laws Act ("TMCLA"), Texas Limited Liability Company Act ("TLLCA"), Texas Revised Limited Partnership Act ("TRLPA"), Texas Real Estate Investment Trust Act ("TREITA"), Texas Uniform Unincorporated Nonprofit Associations Act ("TUUNAA"), Texas Professional Corporation Act ("TPCA"), Texas Professional Associations Act ("TPAA"), the Texas Revised Partnership Act ("TRPA"), the Cooperative Associations Act ("CAA") and other existing provisions of Texas statutes governing domestic entities.

The proposed effective date of the Code is January 1, 2006 to allow for ample time to educate and inform all interested persons and to allow an additional legislative session to meet and consider any further changes to the Code before it becomes effective. The new Code generally would not apply to an existing entity prior to January 1, 2010, unless the entity expressly elects to adopt the Code as its governing statute.

Codification of the organizational statutes of Texas governing private-sector entities is one of the last steps in the overall codification of Texas statutes. The Code will provide Texas with a modern and flexible statute governing for-profit and non-profit, private-sector entities.

STRUCTURE OF CODE

The Code creates an integrated statute, as opposed to a standalone statute, in which common provisions applicable to most forms of entities governed by the Code are placed in a single title with provisions specific to entity type being placed in separate titles. Title 1 of the Code contains the common provisions. The title headings below reveal the basic structure of the Code:

- 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

PURPOSE

As proposed, H.B. 1156 would create the Business Organizations Code for the State of Texas. Although some substantive changes would be made to modernize, simplify and standardize the law, this Code would be generally a nonsubstantive recodification of statutes.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency or institution.

SECTION-BY-SECTION ANALYSIS

Section 1: Section 1 adopts the new Texas Business Organizations Code as follows:

A detailed table of contents is contained in the bill and lists each title, chapter, subchapter and section of the Code.

TITLE 1. GENERAL PROVISIONS

CHAPTER 1. DEFINITIONS AND OTHER PROVISIONS

Subchapter A. Definitions and Purpose

Subchapter A contains definitions used in the Code and provisions relating to the purposes of the Code, synonymous terms in other statutes, dollars as monetary units and short titles for portions of the Code.

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

Section 1.002 contains the definitions for many of the terms used in the Code. This section introduces new terminology not found in existing statutes primarily for the purpose of the provisions of Title 1. Because Title 1 applies to all entities, common terms used for all entities must be formulated.

The new term "organization" is intended to refer in the broadest sense to any kind of entity or organization regardless of jurisdiction of formation or purpose. One subset of an "organization" is an "entity," which is defined to be either a "domestic entity" or a "foreign entity." A "domestic entity" means an organization formed under or the internal affairs of which are governed by the Code. A "foreign entity" means an organization the governing documents of which are adopted under a jurisdiction of formation other than

Texas. "Organizations" formed under other Texas law besides the Code, for example banks and insurance companies, are neither domestic entities, or foreign entities.

The universe of "domestic entities" is further divided into "filing entities" and "nonfiling entities." A "filing entity" includes a domestic corporation, limited partnership, limited liability company, professional association, professional corporation, cooperative, or real estate investment trust. These entities require a filing with the Secretary of State or a county clerk's office as a condition to formation. A "nonfiling entity" includes a domestic general partnership and nonprofit association. These domestic entities do not require formal filings as a condition to formation.

The universe of entities is further divided into "for-profit entities" and "nonprofit entities." A "nonprofit entity" is an entity that is organized solely for one or more of the nonprofit or charitable purposes specified in Section 2.002 and includes a nonprofit corporation and nonprofit association.

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

A "filing entity" is formed by filing a "certificate of formation," which replaces the existing articles of incorporation, articles of organization, certificate of limited partnership or similar document. A "foreign filing entity" is a foreign entity that is required to register under the Code to transact business in Texas. 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." 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." This term refers to the board of directors of a corporation, the trust managers of a real estate investment trust, the general partners of a partnership, the managers of a limited liability company that is managed by managers or the members of a limited liability company that is managed by its members. A "governing person" is a person who serves on the governing authority of an entity. A "managerial official" is an officer or a governing person.

A "filing instrument" is a document or instrument that is required or permitted to be filed under the Code with the Secretary of State. The term "fundamental business transaction" means a merger, interest exchange, conversion or sale of all or substantially all of an entity's assets. The term "interest exchange" is similar to the term "share exchange" as used in the TBCA but applies to exchanges of membership or ownership interests in all domestic entities.

The term "jurisdiction of formation" refers to the jurisdiction in which a filing entity's certificate of formation is filed. In the case of nonfiling entities, "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 nonfiling entity's affairs under contract law principles or otherwise the jurisdiction in which the entity has its chief executive office.

The Code adopts the definition of "affiliate" from the Federal Securities Act of 1933, as amended.

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. 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 and transmissions and reproductions of writings. These terms do not include sound or video recordings.

The terms "certificate of ownership" and "certificated ownership interest" are introduced to make generally applicable to domestic entities the certificated share provisions found in TBCA. The Code also adds a new phrase "uncertificated ownership interest" to mean those ownership interests in domestic entities that are not represented by an instrument and are transferred either by amendment of the governing documents or by registration on books maintained for that purpose. The use of the terms "certificated" or "uncertificated" in connection with particular types of ownership interests throughout the Code should have similar meanings.

The term "fundamental business transaction" is new and means a merger, interest exchange, conversion, or sale of all or substantially all of an entity's assets. Not all domestic entities provide to its owners the rights of dissent and appraisal in connection with a fundamental business transaction. An entity that provides to its owners such rights is referred to as a "domestic entity subject to dissenter's rights." Those entities that provide rights of dissent and appraisal are identified in Subchapter H, Chapter 10.

The Code contains a separate title governing professional associations, professional corporations and professional limited liability companies. These entities are referred to as "professional entities."

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

Section 1.003 supplies the definition of the term "disinterested person."

Section 1.004 supplies the definition of the term "independent person."

Section 1.005 defines the term "conspicuous" when used in connection with required information.

Section 1.006 states that certain phrases and terms in other Texas statutes or codes will be synonymous with certain terms and phrases used in this Code.

Section 1.007 clarifies that a writing has been signed by a person when the writing includes the person's signature. A transmission or reproduction of the writing signed by a person is considered signed by that person for purposes of this Code. This section and the definitions in Section 1.002 of "signature" and "writings" are intended to facilitate the use of electronic filings and to comply with the federal Electronic Signatures in Global and National Commerce Act.

Section 1.008 establishes names by which various portions of the Code may be cited.

Section 1.009 provides that a value or amount required by the Code to be stated in monetary terms must be stated in U.S. dollars unless the context requires otherwise. Currency that is not specified is considered to be in U.S. dollars.

Subchapter B. Code Construction

Subchapter B contains provisions regarding the construction of the Code.

Section 1.051 specifies that the Code Construction Act (Chapter 311, Government Code) applies to the construction of the Code.

Section 1.052 clarifies that references in other laws to a statute revised by this Code is considered to be a reference to the part of this Code that revises that statute.

Section 1.053 states that the Code applies to foreign and interstate affairs only to the extent permitted by the United States Constitution.

Section 1.054 reserves to the legislature the power to prescribe regulations, provisions and limitations binding on any entity subject to the Code.

Subchapter C. Determination of Applicable Law

Section 1.101 states that Texas law governs the formation and internal affairs of an entity formed by the filing of a certificate of formation in accordance with Chapter 4.

Section 1.102 provides that if the entity is formed through the filing of a certificate of formation with a foreign governmental authority, the law of the state or the jurisdiction in which that foreign governmental authority is located governs the formation and internal affairs of the entity.

Section 1.103 provides that if an entity is formed without the filing of a certificate of formation, the law governing the entity's formation and internal affairs is the law of the entity's jurisdiction of formation.

Section 1.104 provides that law governing the entity, as determined under Sections 1.101-1.103, applies to the liability of an owner, member or managerial official for an obligation of the entity.

Section 1.105 provides the definition of the phrase "internal affairs of an entity."

Section 1.106 provides that all foreign and domestic entities are subject to Title 1 of the Code to the extent provided by Title 1. Each title, other than Title 1, applies to a different type of entity to the extent provided by that title. If a provision of Title 1 conflicts with the provision of another title, the provision of the other title supersedes Title 1.

CHAPTER 2. PURPOSES AND POWER OF DOMESTIC ENTITY

Subchapter A. Purposes of Domestic Entity

Subchapter A contains provisions relating to the purposes of domestic entities formed under the Code.

Section 2.001 provides that a domestic entity has any lawful purpose unless otherwise provided by the code.

Section 2.002 specifies the purposes that may be included in the certificate of formation for a domestic nonprofit entity. The TLLCA is silent as to whether a limited liability company can be formed for a nonprofit purpose. While the Code does not explicitly permit a limited liability company to be a nonprofit entity, the provisions of the Code do not prevent that result.

Section 2.003 prohibits a domestic entity from engaging in a business or activity that is unlawful, that may not be engaged in by that entity under state law or that may not be engaged in without first obtaining a license and a license cannot be lawfully be granted to the entity. A domestic entity also may not operate as a bank, trust company, savings association, insurance company, railroad company, cemetery organization or abstract or title company. This Section clarifies that limited liability companies and partnerships may not engage in a business or activity that is unlawful or prohibited by law, that requires a license that cannot be granted to such entities, or that is included in a list of specified types of businesses, such as banking and insurance, that are regulated under other statutes. These limitations were only implied in existing law for these types of entities.

Section 2.004 specifies that except as provided in Title 7, a professional entity may only engage in one type of professional service, unless otherwise expressly authorized under state law, and services ancillary to that type of professional service. Section 2.004 allows a professional entity to provide more than one professional service as its purpose if permitted by the Texas law regulating the professional services. This change clarifies existing ambiguities in Texas law. Existing Texas statutes governing professional entities have been interpreted in an unduly rigid manner. The necessity for a single professional service limitation should be the subject of the special regulatory law governing the profession and not the organizational law.

Section 2.005 specifies that the domestic entity's governing documents may limit the entity's purposes. Section 2.005 states what is implicit in existing Texas law governing all entities, namely that the governing documents of the entity may limit its purposes. This statement was not explicit in some existing Texas statutes.

Section 2.006 permits for-profit corporations to be formed for certain purposes in addition to those permitted by this chapter.

Section 2.007 prohibits for-profit corporations from engaging in certain activities.

Section 2.008 prevents corporations formed to operate a nonprofit institution from forming as a for-profit corporation under Chapter 21.

Section 2.009 permits a nonprofit corporation to have a purpose to organize laborers, workers, or wage earners.

Section 2.010 enumerates entities with certain purposes that may not organized or registered to conduct its affairs in Texas as a nonprofit corporation. Those purposes include the operation of group hospital service, rural credit unions, agricultural and livestock pools, mutual loan corporations, cooperative credit associations, farmers' cooperative societies, cooperative marketing corporations, rural electric cooperative corporations, telephone cooperative corporations, fraternal organizations under the lodge

system, and water supply or sewer corporations.

Section 2.011 sets out a broad description of the type of activities in which a cooperative association may be incorporated to engage. However, it states that a cooperative association may not serve as a health maintenance organization, furnish medical or health care, or employ or contract with a health care provider in a manner prohibited by the statute under which the provider is licensed. It also prohibits a cooperative association from engaging in health maintenance organizations or prepaid legal service corporations.

Subchapter B. Powers of Domestic Entity

Subchapter B contains provisions relating to the powers of a domestic entity.

Section 2.101 provides that a domestic entity has the same powers as an individual and lists what the powers of a domestic entity include. Section 2.101 is derived primarily from similar provisions in the TBCA and TNPCA. The concept of broad powers is implicit in existing Texas law for all domestic entities. This Section clarifies the law with respect to corporations so it is clear that they have the same powers as an individual except as otherwise provided by the Code. In addition, the enumeration of powers has been extended to partnerships and cooperatives, even though similar provisions are not explicit in the statutes currently governing those entities.

The concept of perpetual existence of a corporation was a relatively new concept in 1955 when the TBCA was adopted. However, that concept is now ingrained in corporate law. Accordingly, a provision in TBCA Art. 2.02.A authorizing corporations to have perpetual existence is no longer necessary and has been omitted.

Section 2.102 specifies that certain domestic nonprofit entities or institutions may invest their funds in property for the use and benefit, at the discretion of and in trust for an affiliated convention, conference or association.

Section 2.103 authorizes a domestic entity to create indebtedness. In the absence of fraud, the judgment of the governing authority as to the value of the consideration received for the indebtedness is conclusive. The common law of corporations placed limits on the power of a corporation to incur debts or make guarantees. This common law concept has become antiquated in modern times as corporations have been accepted as separate entities with full legal capacity in all respects. Existing law in TMCLA Article 1302-2.06 provides explicit powers to incur indebtedness and make guarantees. Implicit in the existing Texas law for other domestic entities, including particularly partnerships, is the power to incur indebtedness and make guarantees. The explicit powers to incur indebtedness and make guarantees found in Sections 2.103 and 2.104 also apply to partnerships.

Section 2.104 authorizes a domestic entity to guaranty another person's contract, security or other obligation. The guaranty must be on behalf of an affiliate of the entity or reasonably be expected directly or indirectly to benefit the entity. The governing authority's decision is conclusive except in certain circumstances.

Section 2.105 grants certain powers conferred in the Natural Resources Code to corporations, partnerships or limited liability companies engaged in certain pipeline businesses.

Section 2.106 authorizes the nonprofit corporation described by particular sections of the Internal Revenue Code, in limited circumstances, to serve as trustees of a trust of which the corporation is a beneficiary, or benefiting another similar organization. It also grants immunity from suit for a claim that the nonprofit corporation is engaging in the trust business in a manner requiring a state charter.

Section 2.107 specifies that the certificate of formation of each nonprofit

corporation which is a private foundation is deemed to contain certain language regarding distributions, self-dealing, excess business holdings and investments in accordance with the Internal Revenue Code unless the certificate is amendment to exclude the language.

Section 2.108 provides that a professional association shall have the same powers, privileges, duties, restrictions, and liabilities as a for-profit corporation.

Section 2.109 provides that a professional corporation shall have the same powers, privileges, duties, restrictions, and liabilities as a for-profit corporation.

Section 2.110 states that a cooperative association may exercise the same powers and privileges as a nonprofit corporation and specifically describes certain powers of a cooperative association.

Section 2.111 limits certain organizational expenses of a cooperative association.

Section 2.112 provides that a domestic entity need not state the powers provided by Subchapter A in its governing documents.

Section 2.113 provides that a domestic entity and its managerial officials may not exercise a power in a manner inconsistent with a limitation on its purposes. No action in violation of this state's antitrust laws is authorized.

Section 2.114 specifies that a debt certificate issued by a domestic entity may contain facsimile seals and signatures and signatures of former officers. The provisions of Section 2.114, which were derived from TMCLA Article 1302-2.05, have been expanded to apply to certificated bonds, debentures and other evidences of indebtedness of partnerships. By authorizing facsimile signatures from former officers to be enforceable on such certificates, this provision permits transfer agents to continue to use preprinted certificate forms despite a change in officers.

CHAPTER 3. FORMATION AND GOVERNANCE

Subchapter A. Formation, Existence, and Certificate of Formation

Subchapter A contains general provisions relating to formation, existence and certificates of formation for domestic entities. Subchapter A provides that domestic entities are formed through the filing of a certificate of formation, which differs from existing law where domestic entities filed organizational documents by different names, such as "articles of incorporation," "certificate of limited partnership" and "articles of organization," for example. Chapter 3 also does not carry forward the "substantial compliance" concept of TRLPA Sections 2.01(b) and 2.02(e) because of the simplified forms permitted by this Code.

Section 3.001 provides that a filing entity must file a certificate of formation in accordance with Chapter 4. Upon filing, its existence commences. The filing officer's acknowledgment of the filing is evidence of the entity's formation and existence. This Section differs from certain of the source laws by requiring an acknowledgment of filing by the filing officer rather than issuance of a certificate by the filing officer. There is no change in this connection with respect to real estate investment trusts and partnerships. For limited partnerships, this Section also changes existing law by providing that the acknowledgment of filing by the Secretary of State is conclusive evidence of formation and deletes the concept of "substantial compliance" for formation of a limited partnership and amendments to its certificate of limited partnership.

Section 3.002 refers to the title governing a nonfiling entity for its formation and existence.

Section 3.003 provides that a domestic entity exists perpetually unless otherwise provided in its governing documents or unless terminated in accordance with this code or the Tax Code. Existing law requires the articles of incorporation of a corporation, the certificate of organization of a limited liability company or other formation instruments for other entities to state the period of duration of the entity. As a corollary, the certificate of formation under the Code only needs to state the period of duration if the entity is not formed to exist perpetually.

Section 3.004 specifies the requirements for an organizer of a filing entity and the general requirement that an organizer sign the certificate of formation. The general partners of a domestic limited partnership and the trust managers of a domestic real estate investment trust must sign the certificates of formation of those entities. This Section differs from existing law by requiring the organizer to have the legal ability to contract rather than simply being 18 years of age. The legal ability to contract is more relevant than the age of an individual.

Section 3.005 specifies what must be stated in a certificate of formation and what additional provisions may be contained in a certificate of formation. This Section establishes a standardized basic form of certificate of formation for all domestic filing entities.

Section 3.006 requires the certificate of formation of a domestic filing entity formed under a plan of conversion or merger to be filed with the certificate of conversion or merger. The formation of this entity is effective on the effectiveness of the conversion or merger.

Section 3.007 sets forth information that must be included in a certificate of formation of a for-profit corporation (in addition to the information required for all filing entities pursuant to Section 3.005). Subsection (a) of Section 3.007 relates to all for-profit corporations, subsection (b) relates to for-profit corporations authorized to issue more than one class of shares, and subsection (c) relates to for-profit corporations electing to have preemptive rights under Subchapter E of Chapter 21 or cumulative voting. The requirement under existing law that a for-profit corporation's articles of

incorporation and real estate investment trust's declaration of trust contain a statement that the corporation or trust will not commence business until it has received for the issuance of shares consideration of the value of at least \$1,000 has been eliminated since the \$1,000 requirement has been eliminated. A \$1,000 minimum capitalization has become outmoded and provides little comfort as to adequate capitalization. Section 3.007 reflects the change in presumption regarding silence in a certificate of formation on statutory preemptive rights and cumulative voting of shares. A for-profit corporation formed after the effective date of the Code will not have statutory preemptive rights or cumulative voting of shares unless it elects to do so by including appropriate provisions in its certificate of formation.

Section 3.008 sets forth information that must be and may be contained in a certificate of formation of a close corporation governed by Subchapter O of Chapter 21. A shareholders' agreement or provisions permitted in a shareholders' agreement may be added to a certificate of formation of a close corporation.

Section 3.009 sets forth the information, in addition to that specified in Section 3.005, which must be contained in a certificate of formation of a nonprofit corporation. This information includes information about membership and vesting management of the affairs of the corporation in the members; the number, names and addresses of the initial directors; and applicable statements regarding distribution of assets.

Section 3.010 states the information required to be included in the limited liability company's certificate of formation in addition to the information required by Section 3.005. As a substantive change from existing law, under Section 3.005 the certificate of formation is now required to state the type of entity and need not state the duration of the entity if it is perpetual.

Section 3.011(a) provides that to form a limited partnership, the partners must enter into a partnership agreement and file a certificate of formation. Subsection (b) specifies that the partnership agreement may be included in the plan of merger or conversion. Subsection (c) provides that a certificate of formation for a limited partnership must also include the address of the principal office in the United States where records are to be kept or made available under Section 153.551. Section 3.011(d) provides that a certificate of formation is constructive notice of the fact that the partnership is a limited partnership and of the other facts required to be included in the certificate.

Section 3.012 sets forth the additional statements that must be contained in the certificate of formation of a real estate investment trust.

Section 3.013 sets out the additional statements that must be contained in the certificate of formation of a cooperative association.

Section 3.014 sets forth the supplemental information that is required to be included in a certificate of formation of a professional entity; that is, the type of professional service to be provided and whether the entity is a professional association, corporation, or limited liability company.

Section 3.015 sets forth the supplemental provisions for the certificate of formation of a professional association, including provisions regarding winding up and continuation. It also permits other provisions to be added to the certificate of formation. Sections 3.014 and 3.015 simplify and clarify the form of certificate of formation for a professional association.

Subchapter B. Amendments and Restatements of Certificate of Formation

Subchapter B contains provisions relating to amendments and restatements of the certificate of formation.

Section 3.051 authorizes a filing entity to amend its certificate of formation and states what provisions may be contained in an amended certificate of formation.

Section 3.052 refers to the title of this code that applies to the entity for the procedures to adopt an amendment to the certificate of formation. A filing entity must file under Chapter 4 a certificate of amendment or a restated certificate of formation to amend its certificate of formation.

Section 3.053 specifies what statements must be contained in a certificate of amendment. A certificate of amendment need not specify the date or method of adoption by the owners, as required by the TLLCA, TBCA, TNPCA and other existing law. As to limited partnerships, the requirements for the certificate of amendment are greater than presently required, but the new requirements are procedural in nature. This change simplifies the filing instrument without any significant detriment.

Section 3.054 states that certain supplemental information must be furnished in a certificate of amendment for for-profit corporations if the amendment provides (i) for an exchange, reclassification, or cancellation of issued shares and (ii) for a change in the amount of a corporation's stated capital. It also provides for the execution and filing of a certificate of amendment.

Section 3.055 specifies the additional statements that must be contained in a certificate of amendment for a real estate investment trust and whether an officer or the trust managers may sign the certificate of amendment on behalf of the real estate investment trust. Other required statements are specified in Section 3.053. It also provides for the execution of the certificate of amendment.

Section 3.056 provides that the amendment takes effect on the filing of the certificate of amendment under Chapter 4. Existing causes of action, pending suits and existing rights of nonowners are not affected by an amendment or a name change. There are no provisions similar to subsections (b) and (c) in TRLPA, but may be implied.

Section 3.057 authorizes a filing entity to restate its certificate of formation. The provisions permitting restatements of certificates of formation have no parallel in the TRLPA. The ability of the general partners to effect a restatement of the certificate of limited partnership and all previous amendments is implicit in TRLPA.

Section 3.058 refers to the title of this code that applies to the entity for the procedure to adopt a restated certificate of formation. The filing entity must file a restated certificate of formation in the manner required by Chapter 4 to restate its certificate of formation.

Section 3.059 specifies what must be contained and what may be omitted from a restated certificate of formation. A restated certificate of formation that makes new amendments to the certificate of formation must identify each amended provision and must state that the amendment has been approved in the manner required by this code and the governing documents of the entity.

Section 3.060 specifies that a restated certificate of formation of a for-profit corporation may update director information and who may sign the restated certificate of formation.

Section 3.061 requires that any restated certificate of formation for a church with management of the church vested in the membership include that information regardless of whether it was required to be included in original certificate of formation. The section also requires a nonprofit corporation to update the number, names and addresses of its directors when filing a restated certificate of formation.

Section 3.062 permits a restated certificate of formation of a restated certificate of formation of a real estate investment trust to update trust manager information.

Section 3.063 provides that a restated certificate of formation takes effect on filing under Chapter 4 and supersedes the original certificate of formation and each prior amendment or restatement.

Subchapter C. Governing Persons and Officers

Subchapter C contains certain provisions relating to governing persons and officers of a domestic entity.

Section 3.101 provides a general rule that the governing authority of a domestic entity manages and directs the entity's business and affairs. This rule is subject to the governing documents and the title of the Code governing the entity.

Section 3.102 authorizes governing persons to rely on certain information and data in discharging their duties or exercising a power. The right of contribution is provided from other governing persons that are liable on the same claim. Sections 3.102 and 3.105 permit governing persons and officers to rely on information, opinions, reports and statements concerning the entity or another person prepared or presented by certain persons. These provisions are taken from the TBCA and TREITA but are new with respect to partnerships and limited liability companies. Under the Code, partnerships and limited liability companies may revise these rules by agreement in their governing documents.

Section 3.103 authorizes the election or appointment of officers and specifies the duties of an officer. A person may hold two or more offices unless prohibited. The provisions of Section 3.103 are new to partnerships and limited liability companies. Nevertheless, under existing law, partnerships and limited liability companies may adopt similar provisions by agreement in their regulations or limited partnership agreements. The Code permits limited liability companies and partnerships to revise these provisions by their governing documents.

Section 3.104 provides that an officer may be removed for or without cause by the governing authority or as provided by the governing documents. Election or appointment of an officer creates no contractual rights. In a substantive change, Section 3.104 permits the removal of officers with or without cause. It does not carry forward the provision found in Article 2.43 of the TBCA that permitted a board of directors to remove an officer only if "the best interests of the corporation will be served" by such removal.

Section 3.105 authorizes officers to rely on certain information and data in discharging their duties or exercising a power. This Section makes clear what is only implicit in the TREITA, TRLPA, TLLCA and TRPA.

Subchapter D. Recordkeeping of Filing Entities

Subchapter D contains certain provisions relating to the recordkeeping required by filing entities.

Section 3.151 requires a filing entity to keep books and records of accounts, minutes of meetings, and records of the names and mailing addresses of its owners or members. Certain records need not be maintained by a limited partnership or limited liability company unless its governing documents require them to be maintained.

Section 3.152 gives a governing person the right to examine the filing entity's books and records for a purpose reasonably related to the governing person's service. A court may require a filing entity to open its books and records for inspection and may award a governing person attorneys' fees and other proper relief. This section is based on similar provisions of the TBCA and TREITA. Insofar as a limited liability company may be managed by a manager, this section has no parallel in existing limited liability company laws but could be provided for in the regulations of the limited liability

company. This Section also clarifies that directors of nonprofit corporations and cooperative associations have the right to inspect the books and records of the filing entity. Section 3.152 does not apply to limited partnerships.

Section 3.153 provides that an owner or member may examine the entity's books and records to the extent provided in the governing documents and the title of this code governing the entity.

Subchapter E. Certificates Representing Ownership Interest

Subchapter E contains provisions relating to certificated or uncertificated ownership interests in certain domestic entities. Subchapter E is based on similar provisions in the TBCA and TREITA. TRLPA and TLLCA contain less detailed provisions that authorize limited liability companies and limited partnerships to issue certificates representing their ownership interests.

Section 3.201 provides that ownership interests in a domestic entity may be certificated or uncertificated. In the absence of any contrary provision in the governing documents or a resolution by the governing authority, the ownership interests of a for-profit corporation, professional corporation or real estate investment trust are certificated. Ownership interests in other types of entities are uncertificated unless this code or the governing documents specify otherwise. Existing law is not clear on whether ownership interests in professional associations are by default certificated or uncertificated, but this Section clarifies that uncertificated ownership interests are the default rule for professional associations. Subsection (d) provides that Sections 3.202 through 3.205 do not apply to partnerships or limited liability companies except to the extent specified in their governing documents. Subsection (e) specifies that the governing documents of limited liability companies and partnerships may provide that ownership interests may be evidenced by certificates and may adopt the provisions of Subchapter E, which is a clarification of existing law.

Section 3.202 authorizes facsimile seals on certificates representing ownership interests and states what information must be stated on the front of the certificate. Restrictions on transfer must be stated on the front or back of the certificate. The certificate must also set forth or refer to any special rights of ownership interests of any class or series.

Section 3.203 specifies that the signature of a managerial official on a certificate may be a facsimile. The certificated ownership interest may also contain a signature of a former managerial official.

Section 3.204 requires a domestic entity to deliver a certificate representing an ownership interest to which an owner is entitled.

Section 3.205 requires a domestic entity to provide a specified written notice to an owner of an uncertificated ownership interest that the entity issues or transfers. Exceptions to this rule are provided in subsection (c). Subsection (b) provides that owners of uncertificated ownership interests have the same rights and obligations as certificated ownership interests except as otherwise provided by law.

CHAPTER 4. FILINGS

Subchapter A. General Provisions

Subchapter A contains general provisions relating to filings made with the secretary of state under the provisions of the code.

Section 4.001 requires that a filing instrument be signed by a person authorized by the code to act on behalf of the entity, but does not require the production of evidence of such authorization. This section standardizes filing procedures for all domestic filing entities and limited liability partnerships.

Section 4.002 addresses actions taken by the secretary of state upon acceptance and filing of a filing instrument. In lieu of certificates, as required by the TBCA, TREITA, TNPCA, TLLCA, TPCA, TPAA and CAA, the filing officer merely issues an acknowledgment of filing in the case of each instrument filed with it. Most current laws also require the filing of two copies of each instrument. Under the Code, only one copy is filed, and the filing officer does not return a file-stamped copy, unlike current law. These changes are included in order to permit electronic filings but also give effect to the provisions of TMCLA Art. 7.08.

Section 4.003 permits the filing of a photostatic, facsimile, electronic or similar reproduction of an original filing instrument or original signature on a filing instrument. Permits electronic filing and electronic acknowledgment of a filing. This Section and Section 4.001 retain the permissibility of electronic filings and signatures for all domestic filing entities and limited liability partnerships. Similarly, this Section and Section 4.002 retain the permissibility of electronic acknowledgments and communications by the Secretary of State.

Section 4.004 directs an entity to promptly file each filing instrument required to be filed. This provision clarifies existing law for nonprofit corporations, cooperative associations, limited partnerships and limited liability partnerships. The fee for filing a reinstatement is standardized with the fee payable for reinstatement of a corporation forfeited under the Tax Code. The fee for filing of a certificate of exchange is reduced.

Section 4.005 provides that a certificate issued by the secretary of state or a certified copy of a filing instrument accepted for filing by the secretary of state may be recorded by a court, public office, or official body and accepted by such as prima facie evidence of the facts stated within the certificate or instrument.

Section 4.006 permits the secretary of state to adopt forms for a filing instrument or report required to be filed with the secretary of state, but makes use of such forms permissive.

Section 4.007 imposes civil liability on a person, managerial official, or entity that signed or authorized the filing of a filed filing instrument which contains a false statement or the omission of a material fact. Presently, a person harmed by the filing of a false filing instrument has no statutory right to recover damages for a loss caused by the filing of the false instrument or by the person's reliance on the false instrument, except under TRLPA. Existing law makes the signing of a false document a Class A misdemeanor. However, because prosecution is seldom brought for a violation of present provisions, more effective means of deterring such actions are needed. Section 4.007 is modeled on TRLPA Section 2.08 but omits certain provisions of the TRPA specific to general partners. The omitted provisions condition liability on whether the general partner had sufficient time to amend or cancel the certificate or to file a petition for its amendment or cancellation before the false statement was reasonably relied on and permits a general partner to avoid liability if such instrument is filed within 30 days after the date that the general partner first had or should have had knowledge that a statement in the certificate was false.

Section 4.008 provides that the signing of a filing instrument which contains a false statement or the omission of a material fact with the intent of filing the filing instrument with the secretary of state is a Class A misdemeanor unless the person's intent is to defraud or harm another. In the latter case, the offense is a state jail felony. Existing law simply classifies the offense as a Class A misdemeanor, which is not a felony.

Section 4.009 requires all filing instruments relating to domestic real estate investment trusts to be filed with the county clerk of the county of the principal place of business in Texas of the domestic real estate investment trust.

Subchapter B. When Filings Take Effect

Subchapter B contains general provisions relating to when a filed filing instrument becomes effective.

Section 4.051 provides that a filing instrument takes effect upon filing with the secretary of state. This rule differs from the provisions of the TBCA, TNPCA, TPAA, TPCA, CAA and TLLCA which specify that most filings are effective when the Secretary of State issues a certificate.

Section 4.052 permits a filing instrument to become effective at a specified time and date subsequent to the date of filing by the secretary of state or upon the occurrence of a future event or fact.

Section 4.053 sets forth the information required to be set forth in a filing instrument which is to take effect at a time subsequent to its filing by the secretary of state and time limitations.

Section 4.054 sets forth when a filed filing instrument that is to become effective upon the occurrence of a future event or act becomes effective.

Section 4.055 requires that a subsequent statement be filed with the secretary of state within 90 days of filing a filing instrument that is to take effect upon the occurrence of a future event or fact.

Section 4.056 explains the effect of a failure to file the statement required by Section 4.055.

Section 4.057 permits a filed filing instrument to be abandoned prior to its effectiveness upon filing a certificate of abandonment with the secretary of state. This section sets forth procedure, information required for the certificate, and effect of filing. Existing law permits abandonment of filed filing instruments by limited liability companies and limited partnerships, but not by corporations, real estate investment trusts, professional associations, cooperative associations and limited liability partnerships. Under the TBCA, such a right is granted only in certain circumstances, including, for example, Articles 5.03.L (mergers), 5.17.E (conversions) and 6.05.A (dissolutions). Subsection (e) codifies 1 T.A.C. Section 79.82 in part. Subsection (e) requires, as a prerequisite to filing the certificate of abandonment, that an entity that is a party to the abandonment change its name in the manner required by the code should the name of the entity, in the interim prior to filing the certificate of abandonment, become the same as or deceptively similar to the name of another existing entity.

Section 4.058 lists the filing instruments the effectiveness of which cannot be delayed. Former law listed the filing instruments the effectiveness of which could be delayed.

Section 4.059 describes the information to be included in an acknowledgment of filing by the secretary of state when affirming the filing of a filing instrument that has a specific delayed effective date or the effectiveness of which is conditioned upon the

occurrence of a future event or act.

Subchapter C. Correction and Amendment

Subchapter C contains general provisions relating to the amendment and correction of filing instruments filed with the secretary of state under the provisions of the code.

Section 4.101 permits a filed filing instrument to be corrected by filing a certificate of correction with the secretary of state. TRPA does not contain a similar authority for limited liability partnerships.

Section 4.102 codifies 1 T.A.C. Section 79.24(1) which describes the limitations on correction of filings. A certificate of correction may not revoke or void a filed filing instrument.

Section 4.103 describes the information required in a certificate of correction to be filed with the secretary of state.

Section 4.104 requires that the certificate of correction be filed with the secretary of state.

Section 4.105 provides that the filed filing instrument is considered to have been corrected on the date the filing instrument was originally filed, except as to a party that is adversely affected by the correction, in which case, the filing instrument is considered corrected as of the date of filing of the certificate of correction.

Section 4.106 permits a filing entity to amend or supplement a filing instrument the entity has filed, to the extent permitted by the title relating to such entity.

Subchapter D. Filings Fees

Subchapter D contains a schedule of fees the secretary of state is authorized to collect for filings made pursuant to the code. In general, the changes effected by Subchapter D relating to filing fees result in a standardization of fees for filing instruments that share a commonality of procedure, and also standardize the fee for formation of certain domestic entities that are not subject to franchise taxes under Chapter 171 of the Tax Code.

Section 4.151 authorizes the secretary of state to collect various fees for specific instruments filed by filing entities. Generally, the section results in a standardization of fees for filing instruments that are common and applicable to all entities. The fees are comparable to fees presently authorized under the TBCA for comparable filing instruments. The section also authorizes a fee of \$50 for the pre-clearance of any document. Under existing law, only the TRLPA authorizes the fee for pre-clearance of limited partnership documents; however, the secretary of state provides pre-clearance of a document to be filed on behalf of any entity. Additionally, the secretary of state is authorized to collect the fee established for the filing of the certificate of formation for a filing entity created by the terms of a merger or conversion, in addition to collecting the fee established for the filing of the merger or conversion. Existing law does not authorize the collection of a fee relative to the formation of the entity by merger or conversion. Section 4.151 reduces the fee for a certificate of correction for a limited partnership.

Section 4.152 authorizes the secretary of state to collect various fees for instruments filed by a for-profit corporation. Fees established are generally the same as the fees established under the TBCA for comparable documents. The section reduces the fee for filing of a certificate of exchange. It also standardizes the fee for filing a reinstatement with the fee payable for reinstatement of a corporation forfeited under the Tax Code.

Section 4.153 authorizes the secretary of state to collect various fees for instruments filed by a nonprofit corporation. Fees established are generally the same as the fees established under the TNPCA for comparable documents.

Section 4.154 authorizes the secretary of state to collect the fee specified for an instrument filed by a limited liability company. Fees established increase the fees presently authorized under the TLLCA. Section 4.154 authorizes the collection of a fee established under Section 4.152 for a comparable document filed by a business corporation. The fee provisions of the TLLCA, as enacted in 1987, were drafted to mirror the TBCA fee provisions for comparable documents. However, a separate amendment of the TBCA fee provisions in 1987 established a difference in fees between limited liability companies and corporations which was not originally intended. Section 4.154 standardizes and makes uniform the fees for comparable filing instruments by limited liability companies.

Section 4.155 authorizes the secretary of state to collect various fees for instruments filed by a limited partnership. The filing fee for an amendment to the certificate of formation of a limited partnership is reduced from \$200 to \$150 to make the fee conform to the fee established for an amendment filed by a business corporation.

Section 4.156 authorizes the secretary of state to collect various fees for instruments filed by a professional association. The fee for a certificate of formation for a professional association was increased to be comparable to the formation fee for a limited partnership. A professional association, as well as a limited partnership, is not subject to franchise tax under the Tax Code. By increasing the \$200 formation filing fee to \$750, the professional association formation fee is made comparable to the fee established for formation of a limited partnership.

Section 4.157 authorizes the secretary of state to collect the fees established under Section 4.152 for similar instruments filed by professional corporations.

Section 4.158 authorizes the secretary of state to collect the fees specified for an instrument filed by a general partnership.

Section 4.159 authorizes the secretary of state to collect the fees specified for an instrument filed by a nonprofit association. These fees were previously charged by the Secretary of State under its rules and are not specified in TUUNAA.

Section 4.160 authorizes the secretary of state to collect the fees established under Section 4.151 or 4.152 filed by a foreign filing entity.

CHAPTER 5. NAMES OF ENTITIES; REGISTERED AGENTS AND REGISTERED OFFICES

Subchapter A. General Provisions

Subchapter A contains general provisions relating to the chapter.

Section 5.001 provides that the filing of a certificate of formation, application for registration, or an application for reservation or registration of a name by a filing entity or foreign filing entity does not authorize the use of a name in violation of the rights of another to the name and requires the secretary of state to provide a notice to this effect upon the formation or registration of a filing entity or foreign filing entity and upon the registration or reservation of an entity name.

Subchapter B. General Provisions Relating to Names of Entities

Subchapter B contains general provisions relating to restrictions and requirements for names of entities under the provisions of the code. Sections 5.054, 5.055, 5.056, 5.057, 5.058, and 5.059 set forth the words or phrases indicative of status as a particular type or form of entity and require that the name of an entity contain a word or phrase or an abbreviation of such word or phrase indicative of such entity type. These provisions permit greater flexibility of acceptable abbreviations. Existing law generally sets forth the acceptable abbreviations of the words and phrases with particularity.

Section 5.051 provides that a domestic entity or a foreign entity having authority to do business in this state may transact business under an assumed name. The assumed name of the entity need not meet the requirements of the subchapter. Notice regarding the legal identification of the entity and its organizational form is sufficiently provided for by the filing of the assumed name certificate under Chapter 36, Business & Commerce Code.

Section 5.052 prohibits a filing entity or foreign filing entity from having a name that contains any word or phrase that indicates that it is formed for a purpose it is not authorized by law to pursue.

Section 5.053 prohibits a filing entity or foreign filing entity from having a name that is the same as or deceptively similar to the name of another existing filing entity or foreign filing entity registered to transact business, or a name registered or reserved by a filing entity or foreign filing entity. A similar name may be used if consent is granted by an existing entity having a similar name.

Section 5.054 sets forth the words indicative of incorporated status and requires that a specified word or its abbreviation be contained in the name of a for-profit corporation, foreign corporation and professional corporation. Existing law sets forth the abbreviations of such words with particularity. Section 5.054(a)(1) includes the word "limited" as one that is among the "approved" list of words that a domestic corporation's name must contain. The TBCA and the TPAA do not include this word as an option.

Section 5.055 sets forth the words indicative of status as a limited partnership and requires that a specified word or words or its abbreviation be contained in the name of a limited partnership or foreign limited partnership. Existing law sets forth the abbreviations of such words with particularity. The Section also sets forth certain restrictions relating to the name of a limited liability limited partnership. This Section omits an outmoded prohibition in existing law on the name of a limited partnership including the name of a limited partner.

Section 5.056 sets forth the phrases indicative of status as a limited liability company and requires that the name of a limited liability company or foreign limited liability company contain a phrase or its abbreviation to indicate its status as a limited liability company. Existing law sets forth the abbreviations of such phrases with

particularity.

Section 5.057 requires that the name of a cooperative association contain the word cooperative or an abbreviation of the word.

Section 5.058 sets forth the words and phrases indicative of status as a professional association and requires that the name of the entity contain a word or phrase or its abbreviation to indicate its status as a professional association. Existing law sets forth the abbreviations of such words/phrases with particularity.

Section 5.059 sets forth the phrase indicative of status as a professional limited liability company and requires that the name of the entity contain the phrase or its abbreviation to indicate its status as a professional limited liability company. Also retained are grandfathering provisions for limited liability companies formed before September 1, 1993. Existing law sets forth the abbreviation of such phrase with particularity.

Section 5.060 prohibits the name of a professional entity from conflicting with a law or rule of professional ethics governing a person providing the professional service through the entity.

Section 5.061 prohibits a filing entity or foreign filing entity from having a name that contains the word "lotto" or "lottery." The provision is derived from the TBCA and is made applicable to all filing entities. The current prohibition relates to use of the term "lottery." The section includes the term "lotto" within the prohibition to take into account the "lotto" game instituted since the time of the constitutional amendment authorizing the state lottery in November 1991.

Section 5.062 prohibits a filing entity from having a name that could reasonably be understood to imply that the organization is created by or for the benefit of war veterans or their families and that contains any of the specified restricted words or abbreviations of such words unless written approval or permission for the use of the name is obtained from a Congressionally recognized veterans organization having a name containing the same words or abbreviations. If no Congressionally recognized organization exists, permission must be obtained from the State Commander of the organizations listed within the section. The section is derived for a similar provision in the TMCLA. Current law strictly prohibits usage of the restricted terms without regard to the context in which such terms are used. The section requires preapproval only when a name comprised of one or more of the restricted terms would reasonably imply that the organization is created by or for the benefit of war veterans or their families.

Section 5.063 sets forth the words and phrases indicative of status as a limited liability partnership and requires that the name of the entity contain a word or phrase or its abbreviation to indicate its status as a limited liability partnership. Existing law refers to these kinds of entities as "registered limited liability partnerships" and sets forth the abbreviations of such words/phrase with particularity. The word "registered" is unnecessary, and its removal follows the trend in the laws of other states. This section also clarifies that a limited liability partnership is not subject to the rules on deceptively similar entity names in Section 5.053.

Subchapter C. Reservation of Names

Subchapter C contains provisions relating to the reservation of an entity name.

Section 5.101 permits the reservation of an entity name and sets forth the requirements for the application for reservation of name. This section varies from Section 1.04(a) of TRLPA which limits the persons that may reserve a name of a limited partnership to certain classes of persons.

Section 5.102 prohibits the reservation of an entity name that is the same as or

deceptively similar to the name of an existing filing entity or registered foreign filing entity, or a name reserved or registered to a filing entity or foreign filing entity. A similar name may be reserved with the written consent of the person or entity having the similar name.

Section 5.103 authorizes the secretary of state to reserve a name that is eligible for reservation.

Section 5.104 provides that the name reservation is effective until the 121st day after the date of filing with the secretary of state or until the date the applicant files a written notice of withdrawal with the secretary of state, whichever date is earlier.

Section 5.105 allows a person to renew a name reservation for successive 120-day periods if the person makes a new application for reservation of the name within 30 days of the expiration of an effective reservation. Current statutory provisions do not allow for the "renewal" of the reservation and require a person to await the termination of the reservation's duration before making an application to reserve the name for an additional 120-day period.

Section 5.106 permits the transfer of a reservation of name by filing with the secretary of state a notice of transfer and sets forth the requirements of the notice of transfer.

Subchapter D. Registration of Names

Subchapter D contains provisions relating to the registration of an entity name.

Section 5.151 permits a bank, trust company, savings association, or insurance company, or a foreign filing entity not registered to do business under the code to register its name under the subchapter.

Section 5.152 describes the information required to be set forth in an application for registration of name by an organization described by Section 5.151. Existing law generally requires that a foreign filing entity not authorized to transact business in Texas must furnish a certificate evidencing its good standing under the laws of its jurisdiction of formation in connection with the registration by such entity of a name in Texas. Section 5.152 eliminates this requirement (however, the foreign filing entity must include a statement in its application to register a name that such entity validly exists and is doing business).

Section 5.153 prohibits the registration of a name that is the same as or deceptively similar to the name of an existing filing entity or registered foreign filing entity, or a name reserved or registered to a filing entity or foreign filing entity. A similar name may be registered with the written consent of the person or entity having the similar name. A bank, trust company, savings association, or insurance company may register its name even if its name is the same as or deceptively similar to an existing name if it has been in continuous existence from a date that precedes the date the conflicting name was filed with the secretary of state.

Section 5.154 provides that the name registration is effective until the first anniversary of the date on which the application was accepted for filing or until the date the entity files a written notice of withdrawal with the secretary of state, whichever date is earlier.

Section 5.155 allows a person to renew the person's registration of its name for successive one-year periods if an application to renew the registration of the name is made within 90 days prior to the expiration of an effective registration.

Subchapter E. Registered Agents and Registered Offices

Subchapter E contains general provisions relating to the registered agent and registered office maintained by filing entities and foreign filing entities.

Section 5.201 requires each filing entity and foreign filing entity to designate and maintain a registered agent and registered office address in this state. The section defines a registered agent, and sets forth the requirements of a registered agent and requirements of a registered office. The requirements of a registered agent for a business corporation, limited partnership, and limited liability company vary under current law. Section 5.201 makes these requirements uniform and applicable to all filing entities and foreign filing entities. Paragraphs (1) and (3) of Subsection (c) codify 1 T.A.C. Section 79.28, in part, and make explicit that the registered office address must include a street address where process may be personally served on the entity's registered agent and that such location not be solely the location of a business providing the entity with mailbox service or telephone answering service. Unlike TBCA Art. 2.09 or TRLPA Section 1.06, Section 5.201 permits any entity, not just a corporation, to serve as a registered agent for a corporation or limited partnership, which is already the case for limited liability companies under TLLCA.

Section 5.202 permits an entity to change its registered office, registered agent, or both, by filing a statement with the secretary of state. The section sets forth the information required to be set forth in the statement and the effect of its filing with the secretary of state.

Section 5.203 permits a registered agent of a filing entity or foreign filing entity to change its address or name, or both, by filing a statement with the secretary of state. The provision sets forth the information required to be set forth in the statement, the effect of its filing with the secretary of state, and permits a statement that relates to more than one entity. Current law provides no means for allowing a registered agent to update information relating to the registered agent's name when an amendment to the agent's organizational document effects a name change. Section 5.203 permits the information to be updated by the registered agent rather than the filing entity represented by the registered agent. Section 5.203 permits a registered agent to make a single filing relating to more than one entity.

Section 5.204 permits a registered agent to resign by giving notice to the represented entity and the secretary of state. The section sets forth where notice to the entity should be sent; the time within which such notice should be provided to the secretary of state; the information to be provided in the notice to the secretary of state; the time when such resignation becomes effective, and the action taken by the secretary of state.

Subchapter F. Service of Process

Subchapter F contains general provisions relating to service of process on domestic and foreign entities.

Section 5.251 authorizes the secretary of state to act as an agent of a filing entity or foreign filing entity for purposes of effecting service of process, notice or demand on an entity under circumstances where the entity fails to appoint or maintain a registered agent in this state.

Section 5.252 outlines the procedure for effecting service on the secretary of state pursuant to Section 5.251. Section 5.252(a)(2) allows the Secretary of State to collect a fee for maintenance of a record of service of process and the forwarding thereof.

Section 5.253 specifies the action to be taken by the secretary of state upon receipt of service of process in compliance with Section 5.252. Section 5.253 requires that process forwarded by the secretary of state be by certified mail, return receipt requested. The secretary of state is required to forward a copy of such process to the most recent address of such entity on file with the secretary of state. This procedure

differs from that set forth in Section 1.08(b) of TRLPA, which requires the secretary of state to forward a copy of the process so received to the address of the general partner as it appears on file with the secretary of state.

Section 5.254 requires the secretary of state to maintain a record of each process, notice, or demand served on the secretary under the provisions of the subchapter and sets forth the information to be recorded.

Section 5.255 sets forth persons within a domestic or foreign entity who shall be considered as agents for the purpose of service of process, notice or demand as a matter of law.

Section 5.256 provides that the provisions of the chapter do not limit or affect the right to effect service of process, notice, or demand upon a domestic or foreign entity in any other manner provided by other law.

Section 5.257 specifies how service of process, notice or demand may be served by a political subdivision on a corporation whose certificate of formation has been forfeited under the Tax Code or terminated under Chapter 11 or where registration has been revoked under Chapter 9. Existing law did not explicitly apply to foreign nonprofit corporations, while Section 5.257 is explicit in such application.

CHAPTER 6: MEETINGS AND VOTING

Subchapter A. Meetings

Subchapter A contains general provisions relating to meetings of owners, members, governing persons and committees of entities governed by the code.

Section 6.001 permits the location of meetings of a domestic entity to be set by the entity's governing documents, the agreement of all persons entitled to notice of the meeting, or the person calling the meeting, and establishes the entity's registered or principal office as the default location. Section 6.001 is derived from the TBCA which permitted the locations of meetings to be set by an entity's governing documents or to be held at the entity's registered or principal office if the governing documents were silent. The Code, however, varies from existing law by also allowing all the persons entitled to notice of the meeting to set the location of the meeting.

Section 6.002 permits meetings to occur by conference telephone or other communications equipment if everyone participating can communicate with each other. This section expands former law by permitting meetings by suitable electronic communications systems, including video conferencing technology and the Internet, so long as persons voting by remote communications are sufficiently identified through reasonable measures.

Section 6.003 provides that anyone participating in a meeting is considered to be present unless that person is participating for the purpose of objecting to the meeting because it was not lawfully called or convened.

Subchapter B. Notice of Meetings

Subchapter B contains general provisions relating to notice of meetings of owners, members, governing persons and committees.

Section 6.051 permits each entity to choose in its governing documents the method of providing notice of meetings. A notice must contain the date, time and location of the meeting. If mailed, notice is deemed to be delivered when deposited in the United States mail. If sent by fax or electronic message, notice occurs when the transmission is successful. Existing law does not authorize entities to send notice by facsimile or electronic message. Additionally, the similar provisions found in the TLLCA enable regular meetings to be held with or without notice.

Section 6.052 permits any person entitled to notice to waive notice in writing or by participating in the meeting. Existing law does not explicitly state that participation by shareholders in the meeting of shareholders would constitute waiver of notice of that meeting.

Section 6.053 enables a filing entity to have a valid meeting without giving notice to an owner or member if certain previous notices or distributions mailed to that person's address on the filing entity's books have been returned or if the person is deemed to be a "lost securityholder." A person to whom notice is excused may have this requirement reinstated by sending a written request to the entity that includes the person's current address. For purposes of certificates or other documents filed with the secretary of state, the filing entity may state that notice was given to each person entitled to notice even if notices to certain persons are excused under this section. The Code differs from existing law by expanding the provisions in the section from corporations to all filing entities other than limited partnerships and adds SEC rules permitting a filing entity not to provide notice to a "lost securityholder."

Subchapter C. Record Dates

Subchapter C contains general provisions relating to record dates.

Section 6.101 provides that an entity's governing documents may fix the record date or provide a method by which the record date may be fixed to determine who is entitled to notice of a meeting, to receive a distribution, and to receive notice for any other purpose that requires consent. The governing authority may close the ownership or membership transfer records for no more than 60 days to determine the owners or members for this purpose. The governing authority must fix the record date within 60 days of the date the action is taken. If no date is set, the date that the notice is mailed or that the governing authority declares the distribution will be the record date. These rules are also applicable to any adjournment of a meeting except when the determination has been made through the closing of the ownership or membership transfer records and the stated period of closing has expired. Consistent with the TBCA and TREITA, this Section omits the 90-day time limits on adjournments of meetings for domestic entities covered by the Section, including nonprofit corporations and cooperative associations.

Section 6.102 permits the governing authority to fix a record date to determine when owners or members are entitled to consent to an action without a meeting. If no record date has been fixed and no prior action of the governing authority is required, it will be the first date that the written consent identifying the action taken is delivered to the entity. If no record date has been fixed by the governing authority and prior action of the governing authority is required, the record date will be the date the governing authority adopts a resolution taking the prior action.

Section 6.103 provides that distributions held in suspense by a domestic entity are payable to the owner or member as of the record date determined for that distribution.

Subchapter D. Voting of Ownership Interests

Subchapter D contains general provisions relating to the voting of ownership interests.

Section 6.151 states that subject to other provisions of the Code, a voting of interests is governed by an entity's governing documents.

Section 6.152 prevents ownership interests owned by the issuer of the interests from being voted at any meeting and from counting toward the total number of outstanding interests.

Section 6.153 permits ownership interests in one entity owned by another entity to be voted by the person authorized in the owning entity's governing documents. If the governing documents are silent, the governing authority of the owning entity may determine how the interests are voted.

Section 6.154 permits ownership interests held by an administrator, executor, guardian, or conservator to be voted by that person if the ownership interests form a part of the estate being administered by that person without transferring the interest into the person's name. Ownership interests in the name of the trust may be voted by the trustee. This Section permits more flexibility in the names in which a trustee may hold record title to ownership interests.

Section 6.155 states that ownership interests in the name of a receiver may be voted by the receiver. Ownership interests held by a receiver may be voted by the receiver without the transfer of interests into the receiver's name if authority to do so is contained in a court order.

Section 6.156 states that pledged ownership interests are to be voted by the person in whose name the interests are held.

Subchapter E. Action by Written Consent

Subchapter E contains general provisions allowing the taking of action by written

consent.

Section 6.201 permits actions taken at any meeting of the owners or members of an entity, or the governing authority or committee thereof to be taken by unanimous written consent. A unanimous written consent has the same effect as a unanimous vote at a meeting and may be stated as having that effect in instruments filed with the secretary of state.

Section 6.202 enables the owners or members of a filing entity to take action by written consent signed by the minimum number of owners or members that would be necessary to take that action at a meeting if authorized by the certificate of formation. All the signatures must be gathered within 60 days of the date that the first signature was obtained. The signed written consent must be delivered to the entity. Prompt notice of the action must be given to those owners or members who did not consent in writing to the action. The strict delivery requirements set forth in Sections 6.202 and 6.203 are new for limited liability companies with respect to member consents when less than unanimous consent is obtained.

Section 6.203 prescribes the manner of delivery and address of each written consent given pursuant to Section 6.202. This section is derived from the TBCA and differs from existing law by eliminating the strict requirements for delivery of consents by owners or members to the filing entity when the entity is soliciting the consent. Presumably, in that situation, the filing entity is aware when a consent is signed. Section 6.202 and this section do not apply to non-filing entities. Non-filing entities like general partnerships and nonprofit associations tend to act with less formality in the governing of their affairs.

Section 6.204 eliminates the need to give notice if action is taken by written consent.

Subchapter F. Voting Trusts; Voting Agreements

Section 6.251 permits owners to enter into written voting trust agreements. The interests subject to the agreement must be transferred to a trustee, and a counterpart of the agreement must be provided to the entity to be examined by any holder of an interest in the voting trust. The provisions of this section are new for limited liability companies.

Section 6.252 enables owners to enter into written voting agreements. A counterpart of the agreement must be given to the entity and subject to the right of examination by any owner. The agreement will be enforceable against the parties to the agreement and their successors if the ownership certificates subject to the agreement reference the agreement or if notice is sent to the subsequent holders. Without this information, the agreement is ineffective against a transferee for value who does not have actual knowledge of the agreement at the time of the transfer. However, the agreement is enforceable against any person who is not a transferee for value once that person acquires actual knowledge of the agreement. The provisions of this section are new for limited liability companies.

Subchapter G. Applicability of Chapter to Partnerships

Section 6.301 provides that Chapter 6 does not apply to partnerships but goes beyond existing law by explicitly permitting partnerships by agreement to choose the rules of Chapter 6 to govern their affairs. The formal rules of Chapter 6 should not apply to partnerships, which tend to be governed through less formal decision-making procedures.

Section 6.302 provides that Subchapters C and D do not apply to limited liability companies except to the extent its governing documents specify.

CHAPTER 7. LIABILITY

Section 7.001 permits a domestic entity, other than a partnership or limited liability company, or certain other non-code organizations to adopt provisions in its governing documents that generally exonerate or further limit liability of a governing person for monetary damages to the entity, or its owners or members, for the governing person's acts or omissions in that capacity. The entity may not eliminate or limit such liability to the extent the person (1) has breached a duty of loyalty, (2) has taken action or omitted to act not in good faith in such a way that it breached some other duty owed to the entity or involved intentional misconduct or knowing violation of the law, (3) has received an improper benefit, or (4) is otherwise made liable by statute. For a partnership or limited liability company, subsection (d) clarifies that the duties, including fiduciary ones, of its managerial officials, owners or other persons may be limited or restricted to the extent permitted in Chapters 152 and 153 and Section 101.401, which corresponds with existing law.

CHAPTER 8 . INDEMNIFICATION AND INSURANCE

Chapter 8 provides for indemnification and insurance of governing persons in situations where conflict of interest may be present. The chapter uses new terminology of the Code but, except as noted below, is a nonsubstantive revision of present provisions. Provisions of this kind are necessary to assure that individuals are willing to serve as governing persons in enterprises where they are subject to risk of liability. Provisions corresponding to Chapter 8 are presently applicable to for-profit corporations by TBCA Art. 2.02-1, nonprofit corporations by TNPCA Art. 2.22A, real estate investment trusts by TREITA Section 9.10, limited partnerships by TRLPA Sections 11.01-11.21, and to certain other types of entities by reference to the TBCA or TNPCA. Conforming to existing law, Section 8.002 makes Chapter 8 inapplicable to general partnerships and limited liability companies; however, this Section clarifies that the governing documents of a limited liability company or general partnership may adopt the provisions of Chapter 8 or may contain enforceable provisions regarding indemnification.

Subchapter A. General Provisions

Subchapter A contains definitions relating to indemnification of and insurance for the benefit of certain persons in an enterprise and identifies enterprises which are subject to Chapter 8.

Section 8.001 defines terms which are used in determining the persons (particularly respondents in a proceeding) entitled to indemnification or insurance, the capacities in which they may receive it, the enterprises that may provide it, and the context in which it may be provided.

Section 8.002 states that Chapter 8 does not apply to general partnerships and limited liability companies. The governing documents of these enterprises may adopt provisions of Chapter 8 or may contain enforceable indemnification, advancement, insurance or other arrangements.

Section 8.003 confirms that the certificate of formation may restrict the indemnification rights. The same rule applies to a partnership agreement of a limited partnership.

Section 8.004 specifies that an indemnification provision is valid only to the extent it is consistent with Chapter 8.

Subchapter B. Mandatory and Court-Ordered Indemnification

Subchapter B contains provisions for mandatory and court-ordered indemnification.

Section 8.051 requires an enterprise to indemnify an existing or former governing person for expenses incurred in a proceeding in which the person is a respondent because of that status if the person is wholly successful in defense of the proceeding.

Section 8.052 allows a court to order indemnification of an existing or former governing person or delegate, on that person's application, if the court determines that the person is fairly and reasonably entitled to indemnification. Indemnification is allowed whether or not the person met the standard of Section 8.101 but is limited to reasonable expenses (and does not include judgments or settlements) if the person is found liable to the enterprise or because the person improperly received a personal benefit.

Subchapter C. Permissive Indemnification and Advancement of Expenses

Subchapter C contains provisions for permissive indemnification and advancement of expenses by an enterprise.

Section 8.101 states the standard for indemnification and how the standard can be satisfied in certain circumstances. Subsection (a) sets the basic standard for indemnification of an existing or former governing person or delegate. These determinations and the determination to pay indemnification must be made in accordance with Section 8.103. Subsection (b) states that action reasonably believed by the person to be in the interest of the participants and beneficiaries of an employee benefit plan is not opposed to the best interests of the enterprise. Subsection (c) states that action by a delegate to another enterprise is not opposed to the interests of the first enterprise. Subsection (d) states that a person does not fail to meet the basic standard of Section 8.101(a) solely because the proceeding in which the person was involved was terminated by a judgment, order, settlement, conviction or nolo contendere plea.

Section 8.102 governs the general scope of permissive indemnification. Subsection (a) specifies the kinds of liabilities or obligations for which an existing or former governing person or delegate may generally be indemnified. Subsection (b) limits or bars indemnification of a person who is found liable to the enterprise or is found liable because of improperly receiving a personal benefit. Subsection (c) prescribes when a person is considered to have been found liable.

Section 8.103 governs the manner for determining permissive indemnification. Subsection (a) prescribes several alternative means of determining that the basic standard of Section 8.101(a) has been met. In Section 8.103(a)(2), a determination that the standard for indemnification in Section 8.101(a) has been met may be made by a committee of one disinterested governing person if a quorum of disinterested governing persons cannot be obtained. TBCA Art. 2.01-1F(2) requires two directors for a committee; TRLPA Section 11.06 and TNPCA have no such provision. Section 8.103(a)(5) (permitting indemnification of governing persons by unanimous vote of the owners or members) has no explicit source in the TBCA, TREITA, TRLPA or TNPCA but is implicit in the general principle that all the owners of an enterprise may make any disposition of its assets.

Subsection (b) requires that if special legal counsel determines that a person meets the basic standard of Section 8.101(a), the counsel shall also determine whether the expenses (other than a judgment) are reasonable. Subsection (c) gives effect to a provision requiring indemnification of a person who meets the basic standard of Section 8.101(a)(1) contained in the governing documents, in a resolution of the owners, members or governing persons or in an agreement.

Section 8.104 governs advancement or reimbursement of expenses before a final disposition of a proceeding. Subsection (a) permits advancement or reimbursement of reasonable expenses of an existing or former governing person or delegate who is or is threatened to be made a respondent in a proceeding. The advancement or reimbursement may be made without the determinations required under the basic standard of Section 8.101(a) after a written affirmation and undertaking is received by the person. Subsection (b) gives effect to a provision requiring advancement of expenses contained in the governing documents, in a resolution of the owners, members or governing persons or in an agreement. Subsection (c) states that the written repayment undertaking required by Subsection (a)(2) must be an unlimited general obligation of the person giving it but need not be secured and may be accepted without regard to the person's ability to repay.

Section 8.105 governs permissive indemnification and advancement to persons other than governing persons. Subsection (a) allows an enterprise to indemnify and advance expenses to a person who is not a governing person, including an officer, employee, agent or delegate. The indemnification or advance is permitted to the extent permitted by other law notwithstanding any other provision of Chapter 8 except Section 8.003 and 8.004. Section 8.105(a)(3) (permitting indemnification of and advancement to non-governing persons by unanimous vote of the owners or members) has no explicit source in TBCA, TREITA, TNPCA or TRLPA but is implicit in the general principle that the owners or members of an enterprise may make any disposition of its assets for the

benefit of a person who is not a governing person. Subsection (b) requires an enterprise to indemnify and advance expenses to an officer to the same extent it is required to indemnify and advance expenses to a governing person. Subsection (c) allows a person who is not a governing person to seek indemnification or advancement of expenses to the same extent as a governing person.

Subchapter D. Liability Insurance; Reporting Requirements

Subchapter D provides for liability insurance and related arrangements and reporting requirements.

Section 8.151 authorizes insurance and related arrangements for indemnification. This Section clarifies that permitted "self-insurance" includes implementation by indemnity contract. Subsection (a) allows an enterprise to obtain and maintain insurance or another arrangement to indemnify or hold harmless an existing or former governing person, delegate, officer, employee or agent against any liability asserted against and incurred by the person in that capacity or arising out of the person's status in that capacity. Subsection (b) allows the insurance or other arrangement to insure against liability described in subsection (a) whether or not the enterprise otherwise would have power to indemnify against that liability. Subsection (c) requires approval by owners or members for insurance or another arrangement that involves self-insurance or an agreement to indemnify with the enterprise or with a person not regularly engaged in the insurance business if the insurance or arrangement provides for payment of a liability outside the enterprise's power to indemnify. Subsection (d) permits an enterprise, in addition to insurance or other arrangement, to create a trust fund, self-insure, contract to indemnify, grant security or establish a letter of credit, guaranty or surety arrangement for the benefit of a person to be indemnified. Subsection (e) allows insurance or other arrangement to be obtained and maintained within the enterprise or with any insurer or with any other person considered appropriate by the governing authority, regardless whether the enterprise owns an interest in the insurer or other person. Subsection (f) makes conclusive the governing authority's decision as to insurance or other arrangement and protects governing persons from liability for approving it even though they may be beneficiaries of it. But the subsection does not apply in case of actual fraud.

Section 8.152 requires that an enterprise report an indemnification or advance paid to its governing persons. The report must be in writing and made with or before the notice or waiver of the next meeting of the enterprise and before the next submission of a consent to action without a meeting, and in no case later than a year after the indemnification or advance. Section 11.19 of TRLPA requires that any indemnification of or advance of expenses to a general partner is to be reported promptly in writing to the limited partners and, in any event, not later than six months after the date the indemnification occurs.

CHAPTER 9. FOREIGN ENTITIES

Chapter 9 standardizes the requirements and procedures for registration of foreign entities to transact business in Texas. The provisions utilize the new terminology of the Code, and, except as noted below, are nonsubstantive revisions of present procedures.

Subchapter A. Registration

Section 9.001 requires a foreign entity that affords limited liability to owners or members under the law of its jurisdiction of formation to file an application for registration with the secretary of state to transact business in Texas. Current statutory provisions require the registration of foreign corporations, limited partnerships, limited liability companies, and limited liability partnerships transacting business in Texas. Existing law permits the registration of other types of entities that afford limited liability by broadly defining a foreign limited liability company to include those entities even though the entities are not considered limited liability companies in the jurisdiction of formation. These entities include foreign business trusts, foreign real estate investment trusts, foreign cooperatives, and foreign public or private limited companies or other entities. Foreign real estate investment trusts will register with the Secretary of State under the Code and not in the county where they might conduct business in Texas, unlike the formation of a domestic real estate investment trust. TREITA has no provision regarding registration of foreign real estate investment trusts.

Section 9.002 provides that a foreign entity not described by Section 9.001 may transact business in this state without registration with the secretary of state under this Code, but does not relieve the foreign entity from the duty to comply with applicable registration requirements under other law. Further, this section provides that foreign entities, such as banks, insurance companies, savings institutions and other regulated entities, are not required to register under this Code if other state law authorizes the entity to transact business in this state. Foreign unincorporated nonprofit associations also need not register under this Chapter.

Section 9.003 provides for permissive registration of foreign entities that are regulated entities, if otherwise not prohibited by other Texas law.

Section 9.004 outlines the requirements for the registration application that is standard for all entities. Currently, the requirements for registering or qualifying a foreign limited partnership, corporation, and limited liability company to transact business in this state vary under the different acts. Section 9.004 standardizes the procedures for foreign registration. Existing law requires corporations and limited liability companies to submit a certificate from the jurisdiction of formation evidencing the existence of the entity. This section substitutes an affirmative statement made at the time of application for the certificate. Section 9.004 also requires a foreign corporation and limited liability company to state the beginning date of business in Texas in its application to register, which is a change from the TBCA, TNPCA and TLLCA.

Section 9.005 requires a foreign corporation's application to register to do business in Texas contain certain information concerning its authorized shares, issued shares, and stated capital. There is no longer any requirement that such a corporation state that it has received at least \$1,000 of consideration for its shares, as is required by Article 8.05.A(11) of the TBCA.

Section 9.006 requires a nonprofit corporation to include statements, in addition to those required by Section 9.004, in its application for registration as a foreign corporation regarding the names and addresses of its directors and officers and a statement of whether or not the corporation has members.

Section 9.007 sets out supplementary information that must be included in the application for registration of a limited liability partnership in addition to the information required under Section 9.004.

Section 9.008 directs that the registration takes effect when the application is filed and remains in effect until terminated, withdrawn or revoked. The acknowledgment issued by the Secretary of State is evidence of the authority of the foreign entity to transact business in this state.

Section 9.009 permits a foreign entity to change information in its original application by filing an amendment. An amendment to the application for registration is required when the entity changes its name or its stated purpose. An amendment to reflect the change of name or purpose must be filed within 90 days following the change. Existing law does not specify a time frame for filing the amendment.

Section 9.010 suspends the registration of a foreign entity that has changed its name to a name that would not be available for its use in Texas. The registration is suspended until the entity files an amendment to its registration to change its name to a name that is available to it under the laws of this state. This provision is consistent with the provision in the TBCA but is made applicable to all foreign filing entities by this section.

Section 9.011 contains the procedures for withdrawing the entity's registration, or recording the termination of its existence in its jurisdiction of formation. Additionally, the section provides for the entity to consent to service of process by serving the secretary of state following withdrawal. Section 9.011 simplifies the form of and standardizes procedures for filing a certificate of withdrawal for all foreign filing entities. Subsection (e) codifies 1 T.A.C. Section 79.26 and permits an entity to amend its certificate of withdrawal to evidence a change to the address to which the secretary of state may mail a copy of any process against the foreign filing entity. Section 9.011 changes the requirements for the application for withdrawal for a foreign nonprofit corporation to conform to the requirements for a for-profit corporation. Consistent with the withdrawal for a for-profit corporation, the application for withdrawal does not require a statement that there is no suit pending or threatened against the corporation in this state.

Subchapter B. Failure to Register

Subchapter B specifies the effects and penalties if a foreign filing entity fails to register under Chapter 9 when required to do so.

Section 9.051 allows the attorney general to apply to a court to enjoin a foreign entity from transacting business in this state if the entity is required to register and has not done so. Further, the section provides that a foreign entity may not maintain legal action in this state that arises out of the transaction of business in this state unless the entity is registered as required. Additionally, the section specifies that the validity of any contract or act of the entity is not affected by the failure to register and that the entity is not prevented from defending a legal action in this state. The section also specifies that an owner, member or managerial official of the entity is not liable by contract or under other provisions of law for failure of the entity to register.

Section 9.052 imposes civil penalties for failure to register. Those penalties include all fees and taxes imposed by law on the entity had the entity registered when first required and any applicable penalties and interest as well as any penalties and interest imposed by law for failure to pay those fees and taxes. This includes the late filing fee which the secretary of state is authorized to collect under Section 9.054. Sections 9.052 through 9.054 provide new or revised civil penalties or late filing fees imposed upon failure of a foreign filing entity to register when required. Venue for an action to collect the penalty is also specified.

Section 9.053 sets venue in Travis County for suits brought under Section 9.051 to enjoin an entity from transacting business in this state and Section 9.052 to collect civil penalties.

Section 9.054 authorizes the secretary of state to collect late filing fees when an entity has transacted business in this state for more than 90 days without a certificate of authority. The late filing fee is equal to the registration fee for the entity for each year of delinquency. The TBCA and the TLLCA provide for the attorney general to seek judicial imposition of a fee of not less than \$100 nor more than \$5,000 for each month the entity transacted business in Texas without a certificate of authority. The TRLPA provides for the secretary of state to collect a late filing fee similar to that provided in Section 9.054. This Code provision is modeled after the TRLPA and provides for the assessment of an administrative penalty by the secretary of state since there is no history of the judicial assessment of the penalties under the TBCA or the TLLCA.

Section 9.055 specifies that a foreign entity must comply with requirements under other laws; including, for example, the requirement to file assumed names, register as a limited liability partnership, or comply with applicable securities registrations.

Subchapter C. Revocation of Registration by Secretary of State

Subchapter C contains provisions relating to revocation and reinstatement of the registration of a foreign filing entity. These provisions are generally consistent with those located in the TBCA, TNPCA and TLLCA but are made applicable to limited partnerships.

Section 9.101 permits the secretary of state to revoke the registration of a foreign entity under specified circumstances after notice and an opportunity to correct the entity's failure. References to revocation because of failure to pay franchise taxes were removed since the tax deposit requirement was repealed and forfeitures for failure to pay franchise taxes are governed by the Texas Tax Code.

Section 9.102 requires the secretary of state to file and mail to the foreign filing entity a copy of a certificate of revocation in order to revoke a foreign entity's registration. The contents and effectiveness of the certificate of revocation are also specified.

Section 9.103 authorizes the secretary of state to reinstate the registration of an entity that has been revoked when the entity has corrected the circumstances that led to the revocation or when the secretary of state has determined that the circumstances did not exist at the time of revocation. Existing law does not authorize the secretary to reinstate when it was determined after the fact that the basis for revocation was in error. Existing law restricts reinstatement to specified time periods. The Code provision no longer limits the time period during which an entity may reinstate its registration, and provides that the registration of an entity that reinstates within three years of revocation is considered to have been registered at all times during the period of revocation except that reinstatement has no effect on any personal liability issue during the revocation period.

Section 9.104 sets forth the requirements for reinstatement of the registration of a foreign filing entity, which must be completed within three years after the revocation took effect. A certificate of reinstatement must be filed. The contents of the certificate of reinstatement are specified. No reinstatement under this Section is permitted if the revocation occurs as a result of a court order or a tax forfeiture. Section 9.104 adopts the Secretary of State's form for a certificate of reinstatement and, when applicable, requires the Comptroller's letter of eligibility to accompany a certificate of reinstatement of registration of a foreign filing entity.

Section 9.105 prohibits the secretary of state from accepting a certificate of reinstatement for filing unless the foreign filing entity amends its registration to change its name or obtains consent for use of its name if such name is the same as, deceptively similar or similar to the name of a filing entity or foreign filing entity as provided by or reserved or registered under the Code.

Section 9.106 specifies that a foreign filing entity must follow the Tax Code procedures in order to reinstate its registration after revocation under the Tax Code.

Subchapter D. Judicial Revocation of Registration

Subchapter D contains provisions regarding revocation of a foreign filing entity's registration by court action. These provisions are generally consistent with those located in the TBCA, TNPCA and TLLCA but are also made applicable to limited partnerships.

Section 9.151 authorizes a court to revoke the registration of foreign filing entities under specified circumstances.

Section 9.152 requires the secretary of state to notify the attorney general and a foreign filing entity when the secretary of state determines that cause exists for the judicial revocation of the foreign filing entity's registration under Section 9.151.

Section 9.153 authorizes the attorney general to bring suit to revoke the registration of a foreign filing entity if the entity does not cure the problems for which revocation was sought within 30 days of the notification under Section 9.152(b).

Section 9.154 permits the action to be abated if, prior to the rendition of the judgment, the entity cures the problems and pays the costs of the action.

Section 9.155 directs the court to enter a judgment if it finds that proper grounds exist under Section 9.151(a) for revocation.

Section 9.156 permits a foreign filing entity to make an application for stay of judgment to allow the entity the opportunity to cure the problems when the entity obtains a finding that the problems for which the entity was found guilty were not willful or the result of a failure to take reasonable precautions. The court is authorized to stay an entry of judgment for no longer than 60 days after the date the court's findings are made pursuant to Section 9.155, to dismiss the action if the problems are cured and the costs of the action paid, and to enter a final judgment if the problems are not cured within the time prescribed.

Section 9.157 permits a foreign filing entity an opportunity to cure after affirmation of findings by an appellate court if the foreign filing entity did not make an application pursuant to Section 9.156.

Section 9.158 establishes jurisdiction and venue for a suit for involuntary revocation of the registration of a foreign filing entity.

Section 9.159 provides for service of citation in a suit for the involuntary revocation of the registration of a foreign filing entity. Citation would issue as be served as provided by law.

Section 9.160 authorizes citation by publication when service is returned not found and sets forth procedures for such service.

Section 9.161 requires the clerk of a court to file a certified copy of a judicial decree with the secretary of state when a court has entered a decree revoking a foreign entity's registration to transact business. No fee is charged for such filing.

Subchapter E. Business, Rights and Obligations

Section 9.201 limits the business or activity that a foreign corporation may transact in this state to those purposes permitted under Chapter 2 for a domestic entity unless other law authorizes the entity to conduct additional purposes.

Section 9.202 explains that a foreign entity enjoys the same, but no greater, rights

and privileges than a corresponding domestic entity. Sections 9.202 and 9.203 differ from existing law by clarifying that a foreign general partnership is subject to the same rights, powers, duties and restrictions as a domestic general partnership.

Section 9.203 provides that the owners, members, and managerial officials of a foreign entity are subject to the same duties, restrictions, penalties and liabilities imposed on those persons of a corresponding domestic entity.

Section 9.204 allows a foreign filing entity to exercise its ownership or membership rights in a domestic entity even though not registered to transact business in this state. Section 9.204 clarifies an ambiguity found in TREITA Section 13.10(F) and TBCA Art. 2.29E. The new language clarifies that a foreign filing entity has a right to vote shares that it owns in domestic real estate investment trusts or corporations and to manage or control as a shareholder such entities. However, the language leaves to other sections, primarily Section 9.251, whether these activities rise to the level of transacting business in this state. TBCA Art. 2.29E and TREITA Section 13.10(F) are not clear in this respect. Besides clarifying ambiguities found in TREITA and the TBCA, this Section extends these provisions to apply to nonprofit corporations, cooperative associations and limited liability companies.

Subchapter F. Determination of Transacting Business in this State

Section 9.251 lists those activities that do not constitute transaction of business in this state.

Section 9.252 specifies that the list of activities in Section 9.251 is not meant to be an exclusive list of those activities that do not constitute transacting business.

Subchapter G. Miscellaneous Provisions

Section 9.301 makes the Code provisions regarding foreign registration, including filing procedures, applicable to entities granted authority to transact business under a special statute if the statute specifically provides or to supplement any special statute to the extent not inconsistent with the provisions of the statute.

CHAPTER 10. MERGERS, INTEREST EXCHANGES AND CONVERSIONS

Chapter 10 contains general provisions relating to mergers, interest exchanges and conversions involving domestic entities. Except as noted below, the provisions contained in Chapter 10 are generally non-substantive revisions of the merger provisions found in the TBCA, TNPCA, TLLCA, TRLPA and TRPA.

Subchapter A. Mergers

The use of a single chapter in Title 1 of the Code for the merger, interest exchange and conversion provisions harmonizes the laws applicable to all entities and clarifies the interrelationship between the various statutes governing these activities.

Since revisions effected in the 1997 Texas Legislature, the provisions of the TRPA, TLLCA, TRLPA, TREITA and TBCA have been comparable in most respects. The principal modifications made to existing law by Chapter 10 involve the extension of these more flexible procedures for effecting mergers, interest exchanges and conversion applicable to nonprofit corporations. The provisions of the TNPCA are based on past provisions of the TBCA but have not been updated. Chapter 10 updates the provisions governing fundamental business transactions for nonprofit corporations to parallel the modernized for-profit corporate provisions. Accordingly, nonprofit corporations will be subject to provisions that permit conversions and interest exchanges, that eliminate the concept of "consolidation" by including it within the concept of "merger" and that specify that member approval is not necessary where the nonprofit corporation is not a "party to the merger." Important restrictions on mergers of nonprofit corporations with or conversions into for-profit entities are retained, added or clarified. Although the placement of these provisions in Title 1 may represent a substantive change from existing law for nonprofit corporations, this conforming change was considered a necessary part of the codification process.

Section 10.001 sets forth the general procedure to be followed for a domestic entity to effect a merger. The procedures are substantially the same as under current law. Because different entities will have different types of governing bodies and owners or members, Subsections (a) and (b) require the domestic entity to comply with the approval requirements specific to that type of entity that are set forth in the applicable Title. Subsection (c) cross-references to the notice requirement in Section 10.355.

Sections 10.002, 10.003 and 10.004 set forth the general requirements for a plan of merger based on existing statutes. Section 10.002 specifies the required provisions for a plan of merger. Section 10.002(b) clarifies existing law on the requirements for a plan of merger where a new entity is created by the plan of merger. Section 10.002 clarifies that a plan of merger must contain a description of the organizational form of each organization that is a party to the merger or is created by the plan of merger. In addition, it eliminates the need to attach to the plan of merger the governing documents of certain non-Code organizations that survive or are created by the merger. This Section also clarifies that interest exchange provisions can be included in a plan of merger.

Section 10.002(a)(7) and (8) eliminate the need to attach the governing documents of each foreign organization that survives a merger unless the organization is not formed in the United States and is not required to file its certificate of formation or similar document with the applicable governmental authority under which the organization is organized. Existing law requires the governing documents of each surviving entity that is party to a merger to be attached to the plan of merger. This change conforms Texas law to Delaware law governing corporate mergers.

Sections 10.002 and 10.052 clarify, consistent with provisions of the TBCA, that a plan of merger or exchange may treat differently the owners of ownership interests in the same class or series.

Section 10.003 specifies the supplemental contents of a plan of merger if there is

more than one organization that survives or is to be created by the plan of merger. Section 10.003 makes a minor modification to the provisions of the TBCA relating to payment of funds to dissenters in mergers where there are more than one surviving entity. This Section requires all surviving entities to be responsible for the payment of amounts under the Code to any dissenting owner who perfects that owner's rights of dissent and appraisal. The TBCA allows the obligation to be allocated to only one entity. As a matter of policy, it would be more equitable for all surviving entities to be responsible for the payment with one entity being designated as the entity primarily responsible.

Section 10.004 provides what additional terms may be included in a plan of merger.

Section 10.005 expands the existing provisions of the TBCA allowing for the creation of holding companies without shareholder approval under certain circumstances to other entities, other than partnerships, subject to the same protections applicable to for-profit corporations. This expansion is intended to modernize the merger provisions applicable to non-corporate entities and provide greater operational flexibility to those entities.

Section 10.006 sets forth the Code requirements for effecting "short-form" mergers where one entity owns more than 90% of the voting ownership interest in another entity. These provisions are based on the provisions of the TBCA and TLLCA but have been harmonized with the regular merger provisions and expanded to allow other entities to utilize this approach for completing a merger with a 90% or more owned subsidiary. However, the section does not apply if the subsidiary organization is a partnership.

Section 10.007 specifies when a merger takes effect.

Section 10.008 provides for the effects of a merger. If the surviving organization of a merger is not a domestic entity, the surviving organization is deemed to have appointed the secretary of state as agent for service of process and agreed to promptly pay to dissenting owners or members of each domestic entity that is a party to the merger the amount to which they are entitled under the Code's provisions governing the rights of dissenting owners or members.

Section 10.009 contains special provisions relating to partnership mergers. A partner cannot be made personally liable as a result of a merger without the partner's consent. Provisions specify when a partner is deemed to be an incoming or withdrawing partner as a result of the merger. The partnership agreement must permit the merger, and the partners must approve the plan of merger in accordance with the partnership agreement.

For public policy reasons, Section 10.010 continues certain important merger restrictions on nonprofit corporations found in existing law. As provided in Section 10.010, a nonprofit corporation may not merge into another entity if the domestic nonprofit corporation would, because of the merger, lose or impair its charitable status. Mergers with for-profit or non-Code organizations are permitted so long as any domestic nonprofit corporations continue as the surviving entities. The authority to merge also includes the authority to merge with a foreign nonprofit entity even if the foreign nonprofit entity is the survivor as presently permitted under the TNPCA. When a foreign nonprofit entity survives, the entity is deemed to have appointed the secretary of state its agent for service of process related to the transaction.

Subchapter B. Exchanges of Interests

Sections 10.051 through 10.055 conform and codify the provisions of the Code applicable to interest exchanges. These provisions will extend to all domestic entities and provide greater flexibility to domestic entities in structuring combination transactions.

Section 10.051 authorizes one or more domestic entities or non-Code organizations to adopt a plan of exchange. It also specifies the requirements for effecting an interest exchange pursuant to a plan of exchange.

Section 10.052 specifies the required contents of a plan of exchange. Existing law does not specify the contents of a plan of exchange for partnerships or limited liability companies.

Section 10.053 provides that a plan of exchange may include other provisions relating to the interest exchange.

Section 10.054 specifies when an interest exchange takes effect.

Section 10.055 specifies the effects of an interest exchange.

Section 10.056 specifies how a partnership approves an interest exchange and that the partnership agreement must authorize the interest exchange.

Subchapter C. Conversions

In 1997, the TBCA, the TLLCA, the TRLPA and the TREITA were amended to create a new transaction referred to as a "conversion." A conversion is nothing more than a statutory mechanism to allow an entity to convert from one form to another without having to go through the artificial process of merging into an entity created solely to effect the conversion. Sections 10.101 through 10.108 codify these provisions and make them applicable to all entities. Sections 10.101 through 10.108 omit the specific conversion provision applicable to conversion of a general partnership to a limited partnership, and visa versa, as unnecessary and redundant in view of the broad conversion provisions applicable to domestic entities generally and in order to standardize conversion provisions applicable to the various entities.

Section 10.101 sets forth the requirements for effecting a plan of conversion by a domestic entity.

Section 10.102 sets forth the requirements for a non-Code organization converting into a domestic entity.

Section 10.103 specifies the required contents of a plan of conversion.

Section 10.104 provides that a plan of conversion may include other provisions relating to the conversion that are not inconsistent with law.

Section 10.105 specifies when a conversion takes effect.

Section 10.106 sets forth the effects of a conversion.

Section 10.107 provides that a conversion must be authorized in the partnership agreement of a partnership and how a partnership approves an interest exchange.

Section 10.108 continues the public policy of not permitting a domestic nonprofit corporation to convert into a for-profit entity.

Subchapter D. Certificate of Merger, Exchange, or Conversion

Sections 10.151 through 10.156 set forth the general requirements for certificates of merger, exchange and conversion. The information required to be contained in a certificate has been simplified and made consistent for all transactions. The Code has eliminated a previous requirement that a plan of merger, exchange or conversion be attached to the filing on the basis that this requirement has led to excessive paperwork at the Secretary of State's office for minimal benefit. In lieu of the current requirement to

file a plan of merger, exchange or conversion, the Code has adopted the Delaware approach of requiring the filing entity to undertake to provide a copy of the plan to certain designated interested parties. The Code has also set forth procedures that are to be applicable where a party to a merger is not a "filing entity."

Existing law contains provisions that require articles of merger, exchange or conversion to specify the number of outstanding shares outstanding, the number of shares entitled to vote, including the number of shares entitled to vote only as a class, and the number of shares that voted for and against the transaction. Other states, including in particular Delaware, do not require such detail. The Code substitutes for these provisions statements to the effect that the certificate of merger, exchange or conversion has been approved in the manner required by the Code. Filing procedures are consequently simplified.

The Code eliminates the unnecessary paperwork of filing multiple copies of the certificate of merger or exchange required by existing law based on the number of surviving, new or acquiring organizations that are parties to the plan of merger or exchange. The Secretary of State advises that these extra copies are simply thrown away. The Code only requires one certificate of merger or certificate of exchange to be filed.

Section 10.151(a) specifies when a certificate of exchange or certificate of merger must be filed for an interest exchange or merger to become effective. Subsection (b) sets forth the requirements for the contents of the certificate of merger or exchange. Subsection (c) states that a certificate of merger may also constitute a certificate of exchange.

Section 10.152 sets forth the required supplemental contents for a certificate of merger with respect to a short-form merger effected under Section 10.006.

Section 10.153 specifies how a certificate of merger or exchange must be filed and with which filing officer. In addition, the certificate of formation of each newly formed filing entity in connection with a merger must also be filed with the certificate of merger.

Section 10.153 requires filing of a certificate of exchange after a plan of exchange is approved if interests in a filing entity are acquired. This provision differs from TRLPA, TLLCA and TRPA.

Section 10.154(a) specifies when a certificate of conversion must be filed for the conversion to become effective. Subsection (b) specifies the contents of the certificate of conversion.

Section 10.155 specifies the procedures for filing the certificate of conversion and with which filing officer it must be filed. The certificate of formation of any filing entity that is the converted entity must also be filed with the certificate of conversion.

Section 10.156 specifies that the filing officer may not accept a certificate of merger, exchange or conversion for filing if it does not conform to law or if the required franchise taxes have not been paid or one or more of the surviving, new or acquiring organizations or the converted entity is not liable for the payment of the required franchise taxes.

Subchapter E. Abandonment of Merger, Exchange or Conversion

Sections 10.201 through 10.203 codify the procedures for abandoning a plan of merger, exchange or conversion. The current procedures have generally been retained and modified to make them clearer and simpler. In a change from existing law, Section 10.202 allows abandonment of mergers for nonprofit corporations and cooperative associations after filing of the certificate of merger and before effectiveness of the merger. Section 10.201 clarifies for limited liability companies and limited partnerships

that a merger, exchange or conversion can be abandoned after approval and before filing of the certificate of merger, exchange or conversion, which was only implied in existing law. Sections 10.201 and 10.202 provide explicit provisions for abandonment of mergers, exchanges and conversions for general partnerships, which were only implied in TRPA.

Section 10.201 permits abandonment of the plan of merger, interest exchange or conversion before it takes effect.

Section 10.202 specifies how a merger, interest exchange or conversion may be abandoned after the certificate of merger, exchange or conversion has been filed before its effectiveness.

Subchapter F. Property Transfers and Dispositions

Sections 10.251 through 10.254 contain provisions regarding the power of domestic entities to transfer, sell and lease their property. These provisions are based generally on similar provisions contained in the TBCA. The Code clarifies and sets forth a general rule that, except as may be provided elsewhere in the Code or in the governing documents of an entity, transfers of property do not require owner or member approval. Current requirements for approval by owners or members of sales of all or substantially all the assets of an entity have been retained, where applicable, in the separate titles governing the types of entities. For partnerships and limited liability companies, the provisions of Sections 10.251 through 10.253 differ from existing law by being more explicit and detailed with respect to the rules regarding transfers of property.

Section 10.251 provides the general authority for a domestic entity to transfer and convey its property, including real property. The domestic entity may also pledge or mortgage an interest in its property.

Section 10.252 specifies that as a general rule the approval of the owners or members of the entity is not required to sell, lease, convey, pledge or mortgage an interest in its property.

Section 10.253 provides that a deed may be signed and acknowledged by an officer, authorized attorney-in-fact or other authorized person of the entity or, in the case of a partnership or limited liability company, a governing person of the entity.

Section 10.254 clarifies for all entities, based on explicit provisions in the TBCA and TREITA, that a disposition of assets will not constitute a merger or conversion such that the acquiring entity would be liable for the obligations of the transferring entity under the "de facto merger" doctrine. This rule is not clear in existing law for nonprofit corporations, cooperative associations, partnerships and limited liability companies.

Subchapter G. Bankruptcy Reorganization

Sections 10.301 through 10.306 codify and conform existing law regarding the effect of a federal bankruptcy reorganization proceeding on certain actions that would otherwise require owner or manager approval. These provisions expand to all domestic entities existing law found in the TBCA, the TNPCA and the TREITA. This change is relatively nonsubstantive because federal bankruptcy reorganization law supersedes state law.

Section 10.301 permits a trustee or the officers of a domestic entity being reorganized to take certain actions with respect to the domestic entity subject to bankruptcy proceedings without approval of the domestic entity's governing authority, owners or members.

Section 10.302 permits a trustee or other designated officer of a domestic entity being reorganized under federal statute to sign on behalf of the reorganizing domestic

entity various instruments.

Section 10.303 specifies how a domestic entity that is being reorganized under a plan of reorganization under a federal statute effects a merger or interest exchange.

Section 10.304 eliminates any right of dissent and appraisal for an owner or member of a domestic entity subject to dissenters' rights except as provided by the plan of reorganization for the domestic entity.

Section 10.305 specifies that this subchapter does not apply after the entry of a final decree in a reorganization case under federal statute.

Section 10.306 provides that this chapter does not preclude other changes in a domestic entity or its ownership or membership interests or securities by a plan of reorganization ordered by a court under federal statute.

Subchapter H. Rights of Dissenting Owners

Sections 10.351 through 10.368 primarily codifies existing provisions under the TBCA relating to the procedures to be followed where an owner has a right of dissent and appraisal with respect to a particular act, which the Code defines as "fundamental business transactions." The Code has combined and simplified a number of different statutes that were contained in the TBCA that governed the right of dissent with the objective of providing a clearer procedure to be followed when an owner has a right to dissent to a fundamental business transaction. The Code does not expand these provisions to any new type of entities but permits partnerships and limited liability companies to adopt these provisions in their governing documents. These provisions with respect to real estate investment trusts are updated to parallel modernized corporate provisions.

The Code maintains the existing provisions under the TBCA which provide that the right of dissent and appraisal is the exclusive remedy of an owner who is seeking monetary damages for the action. This limitation is set forth in (i) Section 10.356(e), which states that an owner who does not perfect that owners right of dissent may not bring suit to recover the value of that owner's ownership interest and (ii) Section 10.368, which provides that absent fraud in the transaction, the right of dissent and appraisal is the "exclusive remedy" for recovery of the value of an ownership interest in an organization or of money damages to the owner relating to the action.

Section 10.351 provides for when this subchapter applies.

Section 10.352 provides definitions for use in this subchapter. The Code adds in Section 10.352 a definition of a "responsible organization," which is the organization that is to be primarily responsible for the payment of the fair value of the ownership interest of a dissenting owner.

Section 10.353 specifies the form and validity of notices required by this Subchapter.

Section 10.354 provides the general rule for when an owner will have a right of dissent and appraisal. A more flexible definition is added of what is a national securities exchange and national automated quotation system for purposes of determining whether there is a public market for the securities that are subject to the transaction.

Section 10.355 through 10.361 represents a codification of the current notification procedures contained in the TBCA that must be followed by a domestic entity and dissenting owner. The current statutes are overly complex and inconsistent for different types of transactions. The Code has simplified and conformed the procedures to be followed by eliminating unnecessary notice requirements and clarifying others.

Section 10.355 requires the domestic entity subject to dissenters' rights to provide a specific notice to each affected owner who has a right to obtain an appraisal under Section 10.354.

Section 10.356 sets forth the procedures that a dissenting owner must follow to perfect the owner's right of dissent and appraisal.

Section 10.357 permits an owner to withdraw a demand for payment of fair value of an ownership interest.

Section 10.358 specifies how a responsible organization must respond to a dissenting owner who has given notice of dissent and made a demand for the fair value of the owner's ownership interest.

Section 10.359 requires the responsible organization to note in its ownership interest records any demand for payment for a dissenting owner and place a reference to the demand on any certificate representing that ownership interest.

Section 10.360 sets forth the rights of a transferee of an ownership interest that is the subject of a demand for payment made by a dissenting owner.

Section 10.361 provides for a court proceeding to determine the fair value of the ownership interest and the owners entitled to payment and for appointment of appraisers to determine the fair value.

Section 10.362 provides for the method of determining the fair value of an ownership interest in an organization that is subject to a demand for appraisal under the Code. This section codifies existing law that the valuation is to be made as of the date of the fundamental business transaction without giving any value for appreciation or depreciation occurring in anticipation of the transaction or as a result of the transaction. Section 10.362(b) adds a new provision defining how "fair value" is to be determined. The current statute does not contain a complete definition of "fair value" and leaves much of that determination up to the appraiser and court. Section 10.362(b) provides greater clarity for the determination by providing that the value should be based on a going concern basis without giving effect to any "control premium" or "minority discount." This methodology is consistent with that applied in other states and provides greater certainty to the appraisal process.

Sections 10.363 through 10.365 codify and simplify the current provisions of the TBCA regarding the court's review of the appraisal process and the rights of the appraiser. Section 10.363 sets forth the powers and duties of an appraiser and the appraisal procedures.

Section 10.364 provides for the rights of a dissenting owner or responsible organization to object to all or a part of the appraisal report. A court hearing is required if an objection is raised. The responsible organization must pay the amount required by the court. On payment of the adjudged amount, the dissenting owner does not have an interest in the ownership interest or the responsible organization with respect to that ownership interest.

Section 10.365 provides for payment of the appraiser's fees and allocation of court costs between the responsible organization and the dissenting owners by the court.

Sections 10.366 and 10.367 codify the status of an owner and the ownership interests of an owner who dissents and seeks appraisal under the Code. Section 10.366 provides for the status of the ownership interest held or formerly held by the dissenting owner.

Section 10.367 sets forth the rights of owners following termination of the right of dissent.

Section 10.368 provides that appraisal is the exclusive remedy for recovery of the value of an ownership interest or money damages in a challenge of a fundamental business transaction.

Subchapter Z. Miscellaneous Provisions

Sections 10.901 and 10.902 reaffirm that the provisions of the Code relating to mergers, exchanges, conversions and asset sales do not have the effect of repealing the antitrust laws or the rights of creditors and do not limit the power of an entity to acquire ownership interests in an entity through a voluntary exchange or otherwise.

CHAPTER 11. WINDING UP AND TERMINATION OF DOMESTIC ENTITY

Subchapter A. General Provisions

Many of the existing organizational statutes address the process of dissolution in a cursory manner and provide little guidance to governing persons, legal counsel and courts. The more detailed rules in Chapter 11 provide significant guidance to practitioners, entities and courts with respect to the process of winding up and termination of entities. The requirement of filing a withdrawal of an assumed name certificate in the last sentence of TREITA Section 19.10 is deleted as unnecessary. Any requirement for filing and withdrawal of an assumed name certificate should be left to the assumed name law of this state.

Section 11.001 contains definitions of special terms used only in this Chapter. Terminology for the termination of the existence of a corporation and partnership vary. For example, a corporation's business and affairs are "liquidated" prior to the formal filing effecting a "dissolution," whereas a partnership's business and affairs are "wound up" after the occurrence of an event resulting in "dissolution." The Code standardizes the language relating to the winding up and termination of all domestic entities. Chapter 11 uses the term "terminated entity" to refer to a domestic entity whose legal existence has come to an end, either voluntarily or involuntarily while "terminated filing entity" is a terminated entity that is a filing entity. The term "winding up" is used to refer to the liquidation and termination process.

Subchapter B. Winding Up of Domestic Entity

Section 11.051 specifies the events that require the winding up of a domestic entity. The events include expiration of the entity's period of duration, a voluntary decision to wind up, an event specified in the governing documents, an event specified in this code and a court decree. This Section clarifies for corporations, professional associations and real estate investment trusts that the governing documents may require winding up upon a specified event.

Section 11.052 specifies that a domestic entity must cease carrying on its business, notify its claimants (if not a partnership) and collect and sell its property and perform other acts required to wind up its business and affairs, as soon as reasonably practicable. Existing provisions in the TBCA and TLLCA require a corporation and limited liability company to mail by registered or certified mail written notice to each known claimant against the domestic entity. Section 11.052 does not restrict how such notification must be made and would permit notification by electronic or other technological means.

Section 11.053 specifies that the proceeds of the property must be applied to discharge the entity's liabilities or to make adequate provision for the discharge of the liabilities. If the property is not sufficient to discharge all liabilities, the entity must apply the property to the extent possible to the just and equitable discharge of liabilities or make adequate provision for such discharge. No distributions may be made to entity's owners unless all liabilities are discharged or adequately provided for. Subsection (d) permits a domestic entity to continue its business in whole or in part, including delaying the disposition of the entity's property, only for the limited period necessary to avoid unreasonable loss of the entity's property or business. This provision is similar to TRPA Article 8.03(c) and is made applicable to all domestic entities.

Section 11.054 authorizes a court to supervise the winding up, appoint a person to carry out the winding up, or make other orders regarding a winding up on application of an entity or its owner or member. This Section is new for nonprofit corporations, cooperative associations and partnerships.

Section 11.055 permits a domestic entity to continue a court action during the

winding up process.

Section 11.056 provides that, in addition to the events listed under Section 11.051, the termination of the membership of the last remaining member of a limited liability company is an event that requires the winding up of the company unless within 90 days after the termination, the legal representative or successor of the last remaining member agrees to continue the company and, from the date of the termination, to become a member or to nominate another person to become a member of the company. This Section is new; the source of this Section is Section 18-801(a)(4) of the Delaware Limited Liability Company Act. In addition, the death, expulsion, withdrawal, bankruptcy of a member or other event terminating that member's membership, which provides one of the possible events causing a dissolution of the limited liability company under TLLCA Art. 6.01(5), is deleted as an event requiring the winding up of a limited liability company. Changes in the applicable Treasury Regulations since the passage of the TLLCA make a dissolution of the limited liability company as a result of such an event no longer helpful to ensure treatment of the limited liability company as a partnership for federal income tax purposes.

Section 11.057 sets forth a list of events that, in addition to an event specified in Section 11.051, require the winding up of a general partnership. The source of this Section is TRPA Article 8.01.

Section 11.058 provides that in addition to the events specified in Section 11.051, an event requiring a winding up of a limited partnership includes: (i) the written consent of all partners to the winding up and termination of the limited partnership, and (ii) an event of withdrawal of a general partner. This Section together with Section 153.501 extends the time for the remaining partners, after an event of withdrawal of a general partner, to continue the limited partnership from 90 days to one year.

Section 11.059 specifies that an event requiring winding up of a corporation for purposes of Section 11.051(3) can be set forth in the certificate of formation or a bylaw adopted by its members or owners.

Subchapter C. Termination of Domestic Entity

Section 11.101 requires the filing entity to file a certificate of termination upon completion of the winding up process and specifies what the certificate of termination must contain. The filing requirements and information required in a certificate of dissolution vary under existing laws governing professional corporations, for-profit corporations, nonprofit corporations, limited liability companies, and limited partnerships. For example, the provisions of Article 6.07 of the TLLCA require a dissolving limited liability company to attach copies of the resolution adopted by the members or managers, as appropriate. The articles of dissolution of a for-profit corporation do not require the entity to attach copies of the resolution to dissolve adopted by the shareholders of the corporation. Section 11.101 standardizes the information to be contained in the certificate of termination, and eliminates the need to recite certain lengthy information relating to the winding up process. The resulting standardization and simplification of the certificate of termination will facilitate the preparation, filing and review processes for such documents. In addition, existing law does not clearly specify that a filing be made with the filing officer to reflect a filing entity's termination by reason of the expiration of the entity's stated period of duration. Section 11.101 clearly indicates that a certificate of termination must be filed by the entity under such circumstances.

Section 11.102 provides that the existence of a filing entity terminates on the filing of the certificate of termination.

Section 11.103 provides that the existence of a nonfiling entity terminates on the completion of the winding up of its business and affairs. The section also requires a nonfiling entity to send a notice of its termination if required by its governing documents.

Existing law does not require a nonfiling entity to provide notice of termination in the event of a termination. These provisions are essentially only applicable to general partnerships.

Section 11.104 directs the Secretary of State to remove from its active records a domestic entity whose duration has expired. This Section is new for non-partnerships.

Section 11.105 provides that the certificate of termination of a nonprofit corporation must include statements in addition to those provided in Section 11.101 regarding property available for distribution.

Subchapter D. Revocation and Continuation

Section 11.151 permits a domestic entity to revoke a voluntary decision to wind up in the manner specified in the title governing the entity. After revocation, the entity may continue its business.

Section 11.152 provides that, within one year after an event requiring winding up specified either in the governing documents or this code, the domestic entity may cancel the event requiring winding up in the manner required by the title of the code governing the entity. A domestic entity may also extend its period of duration within three years after the expiration by amending its governing documents. A domestic entity may not cancel an event requiring winding up if prohibited by its governing documents. This Section permits cancellation by approval of its owners of certain types of events requiring winding up, including expiration of the period of duration, of a corporation, professional association, cooperative association, real estate investment trust and limited liability company. This authority is not clear in existing law for all of these types of events requiring winding up. Existing law for limited partnerships allowed only 90 days for expiration of the period of duration and one year for certain other events requiring winding up before canceling such expiration or events and continuing the business. This Section also establishes new time limits of one year and three years to cancel certain events requiring winding up and continue the business of a general partnership.

Subchapter E. Reinstatement of Terminated Entity

Section 11.201 specifies the alternative conditions under which a terminated entity may be reinstated. Sections 11.201 and 11.202 permit a terminated entity to reinstate its status when such action is approved by its owners, members, or governing persons, and a certificate of reinstatement is filed with the filing officer before the third anniversary date of the entity's termination. (The three-year time period is similar to the period of time set forth in the TBCA and TLLCA provisions relating to an entity's survival for certain limited purposes after dissolution.) TBCA Article 6.05.A permits a corporation to revoke its voluntary dissolution proceedings until 120 days after filing articles of dissolution. Section 11.201 permits a terminated entity to reinstate when the termination occurred without the approval of the entity's governing persons or if the termination was inadvertent or by mistake; or when the legal existence of the entity is required to complete the process of winding up, or to permit the entity to take an action, convey or assign property, or sign an instrument, or settle or release a claim. The power to revoke the voluntary dissolution after filing articles of dissolution under TBCA Article 6.05 is not limited to specified circumstances. Existing law for most entities other than business corporations does not permit a terminated entity to reinstate or reactivate under any of the circumstances described. Thus, this Section standardizes the reinstatement rights across most filing entities.

Section 11.202 requires the entity to complete the procedures specified in the title of the code governing the domestic entity no later than the third anniversary of the termination. For a filing entity, the certificate of reinstatement must be filed before the third anniversary. This section specifies the contents of a certificate of reinstatement.

Section 11.203 provides that a reinstated filing entity may not violate the typical

similar name requirements of the code.

Section 11.204 specifies that reinstatement of a terminated nonfiling entity takes effect on the approval.

Section 11.205 provides that the reinstatement of a terminated filing entity takes effect on the filing of the entity's certificate of reinstatement.

Section 11.206 provides that the existence of a reinstated terminated entity is considered to have continued without interruption from the date of termination and the terminated entity may carry on its business as if the termination had not occurred.

Subchapter F. Involuntary Termination of Filing Entity by Secretary of State

Section 11.251 specifies the circumstances under which the secretary of state may terminate a filing entity's existence, other than a real estate investment trust. The entity has 90 days to cure the failure after notice. In addition to authorizing the secretary of state to involuntarily terminate an entity for its failure to file a report or maintain a registered agent, Section 11.251 authorizes the secretary of state to involuntarily terminate a filing entity for its failure to maintain a registered office address in this state, and for its failure to pay a fee required in connection with a filing, which would include filing instruments other than organizational instruments. Existing laws do not authorize the secretary of state to cancel the certificate or registration of certain filing entities for failure to maintain a registered office or to pay a filing fee. Section 11.251 would authorize the involuntary termination on such grounds.

Section 11.251 eliminates the failure of an entity to pay franchise tax or a tax deposit as grounds for termination. Although such failure is a basis for termination in existing provisions of the TBCA, TNPCA, and TLLCA, the practice of the secretary of state is to use the provisions of Chapter 171 of the Tax Code to effect a forfeiture of an entity's articles or certificate. Existing law requires notice to be sent by certified mail to the entity's registered office, or to its principal place of business, or the last known address of one of its officers, directors, or managers, or to any other known place of business of entity. Section 11.251 requires the secretary of state to provide notice by regular or certified mail to the entity's registered office address or principal place of business. Present practice of the secretary of state is to mail notification to the addresses indicated in Section 11.251.

Section 11.252 requires the secretary of state to issue a certificate of termination and deliver a copy to the filing entity in order to involuntarily terminate the filing entity. The contents of the certificate of termination are specified.

Section 11.253 requires the secretary of state to reinstate a filing entity that corrects the circumstances that led to its involuntary termination and files a certificate for reinstatement containing specified information. Existing law requires an involuntarily dissolved entity to make its application for reinstatement within a specified time frame. The Code eliminates such variances and permits reinstatement at any time. This is similar to reinstatement procedures under the Tax Code, which do not restrict the time within which an entity can reinstate. However, although Section 11.253 eliminates the time restrictions for reinstatement, an involuntarily terminated entity is considered to have continued in existence without interruption from the date of termination only when the certificate of reinstatement is filed before the third anniversary date of its involuntary termination. The reinstatement has no effect on the personal liability of an officer, director, manager, member, or agent during the period between dissolution or revocation and reinstatement. This rule is extended to apply to limited partnerships.

Section 11.254 specifies that the procedures in the Tax Code must be followed to reinstate a certificate of formation forfeited under the Tax Code.

Subchapter G. Judicial Winding Up and Termination

The provisions of Subchapter G, which relate to the judicial winding up and termination of a filing entity, the provisions of Subchapter H, which relate to the resolution of claims upon termination of a filing entity, and the provisions of Subchapter I, which relate to receiverships of domestic entities, correspond, in general, to existing provisions found in the TBCA, TNPCA and TLLCA. Except as noted below, the material changes effected by Subchapters G, H, and I, result from making these provisions applicable to certain other domestic entities. Sections 11.301 through 11.315 are new for limited partnerships.

Section 11.301 sets forth the grounds upon which a court may enter a decree requiring winding up of a filing entity's business and terminating its existence as a result of state action.

Section 11.302 provides the procedures that must be followed by the secretary of state in notifying the attorney general and the filing entity of facts relating to the cause for the winding up and termination.

Section 11.303 provides that the attorney general may file an action against the filing entity in the name of the state seeking a winding up and termination if the cause for winding up and termination is not cured within 30 days after the date the notice is mailed to the filing entity.

Section 11.304 provides that the action is abated if the entity cures the problems and pays the costs of the action.

Section 11.305 requires a court to enter a judgment no earlier than the fifth day after the court finds that proper grounds exist for winding up and termination.

Section 11.306 allows a filing entity to file a sworn application for stay of entry of the judgment to permit it to cure the problems. The stay lasts no longer than 60 days after the date the court's findings that a stay is appropriate. The court must dismiss the action if the problems are cured during this stay.

Section 11.307 provides the filing entity a procedure for appeal and remand by an appellate court to grant the filing entity an opportunity to cure the problems. The trial court to which the action is remanded must dismiss the action if the filing entity cures the problem during the period prescribed by the appellate court. The judgment becomes final if the filing entity does not cure the problem with that period.

Section 11.308 specifies that the Attorney General must bring a action for involuntary winding up and termination of a filing entity in a district court of the county where the registered office or principal place of business of the filing entity in this state is located or a Travis County district court. The court has jurisdiction over the action.

Section 11.309 provides that other law will govern the citation in an action for the involuntary winding up and termination of a filing entity.

Section 11.310 specifies that the Attorney General must publish a notice in a newspaper in the county in which the registered office of the filing entity in this state is located if process is returned not found. The contents of the notice are also specified. One notice may cover multiple entities. The notice must be published once a week for two consecutive weeks. A default judgment may not be taken until 30 days after the Attorney General sends a copy of the notice to the filing entity at its registered office.

Section 11.311 states that the expiration of a filing entity's period of duration creates no vested right in an owner or creditor to prevent an action by the Attorney General under this subchapter.

Section 11.312 provides that a filing entity subject to a court decree requiring winding up must comply with the requirements of the decree and subchapter B to the extent it does not conflict with the decree.

Section 11.313 permits a court to terminate the existing of a filing entity by decree when the court considers it necessary or advisable or on completion of the winding up process.

Section 11.314 permits a district court in the county in which the registered office or principal place of business of a domestic partnership or limited liability is located to order the winding up and termination of the partnership or limited liability company. Application for winding up and termination may be made by a partner in the partnership if the court determines the economic purpose of the partnership is likely to be unreasonably frustrated or another partner has engaged in conduct making it unreasonably practical to carry on the business in partnership with that partner. Application for either type of entity may also be made by an owner if the court determines it is not reasonably practical to carry on the entity's business in conformity with its governing documents.

Section 11.315 requires a clerk of a court entering a decree terminating a filing entity to file the decree in accordance with Chapter 4. No fee will be charged for the filing.

Subchapter H. Claims Resolution Upon Termination

Subchapter H contains provisions relating to escheat of property, survivability of a terminated entity for limited purposes and extinguishment of existing claims. These provisions are new for limited partnerships.

Section 11.351 provides that a terminated filing entity is liable for an existing claim. This provision is new for limited partnerships and limits the liability of a terminated limited partnership to claims that existed before termination and post-termination contractual obligations, in a manner similar to existing law for corporations.

Section 11.352 requires a terminated filing entity to reduce to cash the portion of its assets distributable to unknown or unlocatable creditors or owners. Money from the liquidated assets must be deposited with the comptroller together with a statement containing specified information.

Section 11.353 releases the person liquidating a filing entity's assets from further liability with respect to money deposited with the comptroller.

Section 11.354 sets forth the requirements for a person to claim money deposited with the comptroller within seven years after the deposit.

Section 11.355 requires the comptroller to publish in a newspaper in Travis County a notice of the proposed escheat of the money deposited with the comptroller if no claimant has proved a right to the money. The contents of the notice are specified by this section. The money becomes the property of the state if no one properly claims the money within 60 days after the notice is published.

Section 11.356 permits a terminated filing entity to continue in existence for three years for certain purposes. The terminated filing entity may also survive beyond the three-year period to defend or prosecute an existing claim.

Section 11.357 specifies that the governing persons of the terminated filing entity at the time of termination continue to manage the affairs using the three-year survival period. The duties and liabilities of the governing persons are the same as before the termination.

Section 11.358 permits a terminated filing entity to shorten the period for resolving an existing claim against the entity through a specified notice procedure. A person making a claim in response to the notice from the entity must provide specified information. The terminated filing entity receiving a claim may reject the claim by sending a notice containing specified information.

Section 11.359 provides that an existing claim by or against a terminated filing entity is extinguished unless it is brought within three years after the date of termination of the entity. A person's claim against the entity may be earlier terminated if the entity fails to properly make a claim under Section 11.358 or fails to bring an action on a claim rejected under Section 11.358 before 180 days after the rejection and the third anniversary of the effective date of the termination.

Subchapter I. Receivership

Subchapter I contains provisions regarding receivership of domestic entities. These provisions are new for partnerships.

Section 11.401 states that a receiver may be appointed for a domestic entity or for its property or business only as provided for and on the conditions set forth in this Code.

Section 11.402 provides that a court has jurisdiction over the property of a domestic or foreign entity located in this state. A district court in the county in which the registered office or principal place of business of a domestic entity is located has jurisdiction to appoint a receiver for the property and business of the entity or to order the liquidation of the property and business of a domestic entity.

Section 11.403 authorizes the court having jurisdiction over specific property to appoint a receiver in certain actions if specified conditions are satisfied. The court appointing the receiver retains exclusive jurisdiction over the property. If the condition necessitating the appointment of a receiver is remedied, the receivership must be terminated.

Section 11.404 authorizes a court to appoint a receiver for a domestic entity's property and business if certain matters are established by an owner or member of the domestic entity or by a creditor of the entity. If the condition necessitating the appointment of the receiver is remedied, the receivership must be terminated.

Section 11.405 authorizes a court to order the liquidation of the property and business of the domestic entity and to appoint a receiver to effect the liquidation under certain conditions. If the condition necessitating the appointment of the receiver is remedied, the receivership must be terminated.

Section 11.406 specifies that a receiver must be either an individual U.S. citizen or an entity authorized to act as a receiver and must give a bond required by the court. The entity has the power to sue and other powers and duties provided by other laws applicable to receivers and as stated in the order appointing the receiver. A foreign filing entity may be a receiver if it is registered to transact business in this state. The Section expands existing law by permitting authorized, noncorporate entities to serve as receivers.

Section 11.407 provides that a court may require all claimants of a domestic entity in receivership to file with the court clerk or the receiver a sworn proof of the claims and sets forth the procedures for the filing of claims. A court may bar a claimant who fails to file proof of claim from participating in a distribution of the property of a domestic entity.

Section 11.408 authorizes the supervising court to pay the receiver or the receiver's attorney from the property of the domestic entity that is in receivership. The court appointing the receiver has exclusive jurisdiction over the domestic entity and all of

its property, regardless of where the property is located.

Section 11.409 authorizes a district court in the county in which the registered office of a foreign entity doing business in this state is located to appoint an ancillary receiver for the property and business of the entity if the court determines circumstances require the appointment. The receiver serves ancillary to a receiver acting under orders of an out of state court having appropriate jurisdiction to appoint that receiver.

Section 11.410 provides that a district court may appoint a receiver for all the property in and outside this state of a foreign entity doing business in this state and its business if the court determines that circumstances require the appointment. The appointing court must convert the receivership to an ancillary receivership if a court in another state has ordered a receivership of all property and business of the entity and the appointing court determines the ancillary receivership is appropriate.

Section 11.411 provides that governing persons and owners or members of a domestic entity are not necessary parties to an action for receivership or liquidation of the property and business of a domestic entity unless relief is sought against those persons individually.

Section 11.412 specifies that a entity must be terminated by the court when the expenses of the action and all obligations and liabilities of the domestic entity have been paid or adequately provided for and all of the entity's remaining property has been distributed to its owners and members or if the entity's property is not sufficient to discharge such expenses, obligations and liabilities, when all the property of the entity has been applied toward their payment.

Section 11.413 sets forth supplemental provisions that apply to nonprofit corporations when a court has ordered distribution of property.

CHAPTER 12. ADMINISTRATIVE POWERS

Chapter 12 contains provisions relating to the administrative powers of the secretary of state and attorney general regarding filing entities and foreign filing entities. The provisions utilize the new terminology of the Code, and expand current provisions to all domestic and foreign filing entities to achieve standardization, with certain exceptions.

Subchapter A. Secretary of State

Subchapter A contains provisions relating to the power and authority of the secretary of state regarding filing instruments under the provisions of this Code. Sections 12.002-12.004 do not apply to domestic real estate investment trusts.

Section 12.001(a) authorizes the secretary of state to adopt procedural rules for the filing of instruments under the provisions of the code. This authority is explicitly provided for under TRPA and TUUNAA, and implicit under present provisions of TBCA, TNPCA, and TLLCA, but is made explicit by this Section. Section 12.001(b) confers upon the secretary of state the power and authority reasonably necessary to perform the duties imposed by the Code. The power to perform the secretary's duties is explicitly extended to limited partnerships and limited liability partnerships, as well as foreign real estate investment trusts.

Section 12.002 authorizes the secretary of state to issue interrogatories to require a filing entity or foreign filing entity to provide further information to determine whether the entity has complied with the provisions of the Code. The section sets forth the time within which the interrogatory must be answered, and the action to be taken by the secretary of state when written answers disclose a violation of the code or the when the entity fails to provide answers to the interrogatory. This Section makes explicit for nonprofit corporations, cooperative associations and limited partnerships the interrogatory power of the secretary of state, which was only implicit under existing law. That same power is extended also to foreign real estate investment trusts.

Section 12.003 provides that the interrogatory and answer to the interrogatory issued under Section 12.002 are subject to disclosure under the provisions of the Public Information Act, Chapter 552, Government Code. Existing law prohibits disclosure of any facts or information obtained from an interrogatory except when official duty would require the information to be made public or when needed as evidence in a criminal proceeding or other state action.

Section 12.004 requires the secretary of state to provide written notification within 10 days of the delivery of a filing instrument if the secretary of state determines that a filing instrument cannot be filed. The section permits a de novo judicial appeal of the secretary of state's disapproval, establishes venue in Travis county, and sets forth the information to be provided in the petition. This permissive court appeal of a disapproval by the secretary of state of the filing of an instrument is new for limited partnerships and limited liability partnerships.

Subchapter B. Attorney General

Subchapter B contains general provisions regarding the power and authority of the attorney general relating to filing entities and foreign filing entities. These provisions are not contained in the TLLCA, TRLPA or TREITA and are new for limited partnerships, limited liability companies, and real estate investment trusts.

Section 12.151 authorizes the attorney general to examine, inspect and make copies of any of the books and records of a filing entity or foreign filing entity.

Section 12.152 requires the attorney general to make a written request to examine the business of a filing entity or foreign filing entity. The request is to be directed to a

managerial official of the entity.

Section 12.153 authorizes the attorney general to examine the management and conduct of a domestic or foreign filing entity to determine whether the entity has been or is engaged in acts in violation of its governing documents or in violation of any law of this state.

Section 12.154 prohibits disclosure of information held by the attorney general and derived in the course of an examination of the entity's records or documents. Such information is not public information under the provisions of Chapter 552, Government Code and may only be disclosed in the course of an administrative or judicial proceeding in which the state is a party under the circumstances outlined in the section.

Section 12.155 permits the forfeiture of an entity's right to do business in the state and the cancellation or forfeiture of the entity's certificate of formation or registration for its failure to permit the attorney general to examine or take copies of a record of the entity.

Section 12.156 makes the failure or refusal of a managerial official or other authorized individual managing the affairs of an entity to permit the attorney general to make an investigation of the entity or take copies of a record of the entity a Class B misdemeanor. This designation as a Class B misdemeanor clarifies existing law, which only establishes a monetary fine and time of imprisonment.

Subchapter C. Enforcement Lien

Subchapter C contains provisions relating to enforcement liens. These provisions are not contained in the TLLCA, TRLPA or TREITA and are new for limited partnerships, limited liability companies, and real estate investment trusts.

Section 12.201 grants the state a lien on all property of a filing entity or foreign filing entity in this state upon the filing of a suit by the attorney general for the violation of a law of this state for which violation a fine, penalties, or forfeiture of the entity's formation or registration is provided.

Subchapter D. Enforcement Proceedings

Subchapter D contains provisions relating to enforcement proceedings. These provisions are not contained in the TLLCA, TRLPA or TREITA and are new for limited partnerships, limited liability companies, and real estate investment trusts.

Section 12.251 authorizes a court in which a suit is pending to forfeit a filing entity's formation instrument or a foreign filing entity's registration to appoint a receiver for the property and business of an entity in this state.

Section 12.252 authorizes the attorney general to bring suit to foreclose a lien created by the chapter and provides procedures for citation in such suit when the entity is dissolved or has had its formation instrument or registration forfeited by a judgment.

Section 12.253 authorizes the attorney general to bring an action to forfeit an entity's formation instrument or registration when the filing entity or foreign filing entity is insolvent.

Section 12.254 permits a district or county attorney to bring suit under Sections 12.252 and 12.253 when directed to do so by the attorney general.

Section 12.255 requires the attorney general, or a district or county attorney, to obtain permission to sue an entity under the provisions of Sections 12.252 or 12.253 by obtaining the leave of the judge of the court in which the suit would be filed.

Section 12.256 provides for the examination of the petition and facts by the judge of the court in which a suit brought under Sections 12.252 or 12.253.

Section 12.257 provides for the dismissal of an action under Section 12.253 or 12.258 if the entity, through its owners or members, reduces its indebtedness so that it is not insolvent.

Section 12.258 permits a court hearing a proceeding under Section 12.253 to appoint a receiver for the entity and its property to liquidate the insolvent entity.

Section 12.259 grants the state the remedies of a writ of attachment, garnishment, sequestration, or injunction, without bond, to aid in the enforcement of the state's rights.

Section 12.260 provides that the dissolution or forfeiture of a filing entity's formation instrument or the cancellation of a foreign filing entity's registration does not abate an action by the state for a fine, penalty, or forfeiture against the entity.

Section 12.261 provides that the rights and remedies provided by the chapter are cumulative and do not affect any other right or remedy provided by law.

TITLE 2. CORPORATIONS

CHAPTER 20. GENERAL PROVISIONS

Chapter 20 contains provisions that are of general applicability to both for-profit and not-for-profit corporations.

Section 20.001 authorizes officers of corporations to sign filing instruments.

Section 20.002 is the "ultra vires" provision, and describes the consequences of a corporate act that is taken by a corporation that lacks the corporate capacity to take the act.

CHAPTER 21. FOR-PROFIT CORPORATIONS

Chapter 21 contains provisions applicable to for-profit corporations that supplement Title 1 of the code.

Subchapter A. General Provisions

Subchapter A contains general provisions relating to for-profit corporations.

Section 21.001 explains that Chapter 21 applies only to domestic for-profit corporations formed under the code and to foreign for-profit corporations that transact business in the State of Texas, whether or not the foreign corporation is registered to transact business in the State of Texas.

Section 21.002 contains a number of definitions that are used in Chapter 21. The definitions include authorized share, board of directors, cancel, consuming assets corporation, Investment Company Act, net assets, share dividend, stated capital, surplus and treasury shares. Special definitions of corporation and distribution apply in this chapter. The definition of board of directors clarifies that persons authorized to perform functions of the board of directors under a shareholders agreement are treated as directors for most purposes in this Chapter.

Subchapter B. Formation and Governing Documents

Subchapter B contains general provisions relating to the formation of and governing documents for for-profit corporations, including provisions relating to the amendment of a corporation's certificate of formation. Chapter 21 omits the outmoded requirement that an unincorporated business must publish a notice of intent to incorporate when incorporating without a name change found in TMCLA Article 13.02-2.02.

Section 21.051 provides that no shareholder of a corporation has a vested property right resulting from a certificate of formation.

Section 21.052 states the procedures for adopting amendments to a certificate of formation.

Section 21.053 provides that the Board of Directors of a corporation may adopt an amendment to the certificate of formation of the corporation without shareholder approval if no shares are issued and outstanding.

Section 21.054 requires shareholder approval of an amendment to the certificate of formation if there are shares issued and outstanding.

Section 21.055 requires that each shareholder receive written notice of proposed amendment(s) to the certificate of formation, which may be unlimited in number, and the affirmative vote of shareholders entitled to vote required by Section 21.364.

Section 21.056 sets forth the procedures that are to be followed by a corporation to restate its certificate of formation.

Section 21.057 discusses the need for a corporation to have bylaws and the authority of the board of directors to adopt, amend, and repeal bylaws.

Section 21.058 provides that, unless the right is expressly denied in a specified manner, shareholders have the right to adopt, amend, and repeal bylaws that is at least coextensive with that of the board of directors.

Section 21.059 contains provisions relating to the need for and mechanics of calling an organization meeting of the board of directors.

Subchapter C. Shareholders' Agreements

Subchapter C contains provisions relating to agreements between or among shareholders that relate to certain aspects of the internal affairs of the corporation.

Section 21.101 grants shareholders of a corporation the right to enter into an agreement with respect to specified matters, including those that relate to the exercise of corporate powers, the exercise of which was traditionally reserved to the board of directors. The section also specifies the manner in which such an agreement may be adopted and amended.

Section 21.102 limits the term of a shareholders' agreement to ten years unless otherwise provided in the agreement.

Section 21.103 requires that the existence of a shareholders' agreement be disclosed in a specified manner.

Section 21.104 makes it clear that a shareholders' agreement that complies with the provisions of this subchapter is binding on the shareholders and the corporation even if its terms are inconsistent with the code.

Section 21.105 gives a purchaser of shares of a corporation the right to rescind the purchase if the purchase was made without knowledge of the existence of a shareholders' agreement of the type authorized by this subchapter.

Section 21.106 shifts the liability normally imposed on directors of a corporation away from the directors and to the persons who exercise, pursuant to a shareholders' agreement, the powers normally exercised by directors.

Section 21.107 clarifies that the existence of a shareholders' agreement authorized by this subchapter does not authorize the imposition of personal liability on shareholders for acts or obligations of the corporation.

Section 21.108 permits an organizer of or subscriber for shares of a corporation to be a "shareholder" for purposes of adopting a shareholders' agreement under this subchapter if no shares have been issued at the time the agreement is signed.

Section 21.109 provides that a shareholders' agreement automatically ceases to be effective when the corporation's shares are publicly traded and requires that the corporation elect a board of directors at that time if it does not already have one. It also permits the board of directors to amend the corporation's certificate of formation, without shareholder action, to delete any reference to the shareholders' agreement at that time.

Subchapter D. Shares, Options, and Convertible Securities

Subchapter D contains provisions that relate to the securities of a corporation.

Section 21.151 gives a corporation the authority to issue up to the number of shares stated in its certificate of formation.

Section 21.152 authorizes a corporation, in its certificate of formation, to divide its authorized shares into classes and to divide classes into series. It also mandates that all shares of the same class must have the same par value or be without par value and that all shares within the same class must be identical unless the class is divided into series, in which case all shares within the same series must be identical.

Section 21.153 states that the designation, preferences, limitations, and relative rights of each class or series of shares are to be specified in the certificate of formation. Express authority is given to the corporation to provide, deny, or limit the voting rights of a particular class or series of shares so long as the voting rights are not inconsistent with

the code.

Section 21.154 contains a non-exclusive list of the types of preferences and rights that a class or series of shares may have.

Section 21.155 permits, if the corporation's certificate of formation authorizes it, the board of directors of a corporation to establish a series of unissued shares and to determine the designation, preferences, limitations, and relative rights of such series. It also permits, subject to certain limitations, the board of directors to increase or decrease the number of shares in such series unless the authority to do so is denied in the certificate of formation, to delete such a series, and to amend the designation, preferences, limitations, and relative rights of such a series. The section also contains certain procedures to be followed by the board of directors to establish such a series and take the other actions permitted by this section. Section 21.155 adds to the existing law by allowing the board to amend the characteristics of a series it has created if none of the shares in that series have been issued.

Section 21.156 requires a corporation that intends to act under Section 21.155 to file a notice with the secretary of state, including a copy of any resolution required by Section 21.155. The resolution(s) that accompany the notice filing will become amendments to the certificate of formation.

Section 21.157 authorizes a corporation to issue shares if authorized by its board of directors. The shares may not be issued until the consideration required to be paid or delivered for them has been paid or delivered. Upon payment or delivery of such consideration, the subscriber or other person entitled to receive the shares is a shareholder with respect to such shares, and the shares are considered fully paid and nonassessable.

Section 21.158 permits a corporation to issue shares as authorized in a plan of conversion or a plan of merger.

Section 21.159 sets forth the types of consideration for which shares, whether with or without par value, may be issued, including a tangible or intangible benefit, cash, a promissory note, services performed or a contract for services to be performed, a security of the corporation or any other organization, and any other property.

Section 21.160 provides that the consideration to be received for shares must be determined by the board of directors or by a plan of conversion or a plan of merger. However, if the corporation's certificate of formation reserves to shareholders the right to determine the consideration to be received for shares without par value, the shareholders and not the board of directors shall determine the consideration for those shares before they are issued. This section also permits a corporation to dispose of treasury shares for consideration determined by the board of directors.

Section 21.161 provides that the consideration to be received by a corporation for the issuance of shares with par value may not be less than the par value of the shares. It also contains special rules for determining the amount of consideration actually received by a corporation for the issuance of its shares in a share distribution, in connection with the conversion or exchange of debt, and upon exercise of an option or right.

Section 21.162 states that, in the absence of fraud, the judgment of the board of directors, the shareholders, or the party approving a plan of merger or a plan of conversion is conclusive in determining the value and sufficiency of the consideration received by a corporation for its shares.

Section 21.163 authorizes a corporation to issue fractional shares and scrip and contains various provisions relating to the rights of the holder and the corporation with respect to fractional shares and scrip.

Section 21.164 outlines the rights of holders of fractional shares or scrip.

Section 21.165 streamlines the language pertaining to subscriptions to buy shares and makes clear that subscriptions should be treated as contracts. The corporation can accept a buyer's subscription by notifying the subscriber in writing, eliminating existing Article 2.14.C's cumbersome requirement of a formal resolution of acceptance by the board of directors or a memorandum of acceptance by an authorized officer. Eliminated are the arcane provisions of existing law that provide that any subscriptions submitted with the articles of incorporation are deemed accepted by the corporation and any subscriptions not submitted are deemed rejected, regardless of the parties' intent.

A written, signed offer to subscribe to a corporation being formed cannot be revoked by the subscriber for six months, unless the subscription specifies a different time period or all of the other subscribers agree to let it be revoked. A written offer to subscribe to a corporation already formed is a contract between the subscriber and the corporation. TBCA Article 2.14 requires the shares to be paid for in full before they can be issued. The new law allows installment payments. After formation, a corporation may collect on amounts due for preformation subscriptions. As with existing law, the corporation can require forfeiture of the subscription on twenty days' written notice to the subscriber. Section 21.166 adds, however, that the corporation may keep any part of the subscription already paid.

Section 21.166 contains additional provisions that relate to subscriptions made prior to the formation of a corporation. These provisions include the right of the corporation to determine the payment terms (if not specified in the subscription), including terms that require payment in full or permit installment payments, a requirement that the corporation call for payment of all subscriptions on a uniform basis, authority for the corporation to treat unpaid preformation subscriptions as debt and to forfeit a subscription if an installment or call remains unpaid for 20 days notice, and the right of the corporation to retain all amounts paid on a subscription prior to its forfeiture. Minor changes from current law were made.

Section 21.167 provides that a written commitment to acquire shares of a corporation may bind the person making the commitment to act in a specified manner following the acquisition. This provision does not have a predecessor in the TBCA.

Section 21.168 gives a corporation the express authority to create and issue options and other rights to acquire its securities and debt that is convertible into its securities so long as the terms on which such option or right may be exercised or such debt may be converted are stated in the option, right, or debt.

Section 21.169 contains a non-exclusive list of the terms and conditions that may apply to any option or other right to acquire securities of a corporation. The provisions of Section 21.169 are new and validate shareholder rights plans and restrictions, conditions, and limitations on the exercise, transfer, or receipt of rights and options by certain persons or classes of persons. The provisions also make it clear that the board of directors has the exclusive right to grant, amend, redeem, extend, or replace any options or rights, unless otherwise provided in such option or right or plan under which the option or right was granted, and a bylaw provision cannot require the board of directors to take any such action.

Section 21.170 states that, in the absence of fraud, the judgment of the board of directors as to the adequacy of the consideration received for options or other rights to acquire the corporation's securities or debt that is convertible into the corporation's securities is conclusive. It also permits a corporation to issue, under certain circumstances, rights and options to its shareholders, employees, and directors without consideration and requires the consideration to be received by a corporation upon exercise of an option or right to acquire shares with a par value to be at least equal to the par value.

Section 21.171 states that treasury shares are considered to be issued but not outstanding and are not to be included in determining the net assets of the corporation.

Section 21.172 provides that a corporation may pay or authorize to be paid out of the consideration received by the corporation as payment for its shares the reasonable charges and expenses of the organization and reorganization of the corporation and the sale or underwriting of the shares without rendering the shares not fully paid and nonassessable.

Section 21.173 specifies the records that a corporation, or its transfer agent or registrar, must maintain in addition to those required to be kept under Section 3.151.

Subchapter E. Shareholder Rights and Restrictions

Subchapter E contains provisions relating to the rights of shareholders and restrictions on those rights.

Section 21.201 gives a corporation the right to treat, for certain purposes, the person who is the registered owner of a share as the owner of that share.

Section 21.202 defines "shares," for purposes of Sections 21.203 through 21.208, to include any security that is convertible into shares or that carries a right to subscribe for or acquire shares.

Section 21.203 states that there are no preemptive rights unless provided by the certificate of formation. This is a change from the former law, which provides that preemptive rights exist unless expressly denied in the certificate of formation.

Section 21.204 describes the rights of a shareholder if the certificate of formation includes a statement that the corporation "elects to have a preemptive right." Preemptive rights thus exist only if the certificate of formation so provides. This section also makes certain changes in the circumstances under which preemptive rights, even if they exist, do not apply. Existing law provides that shareholders have preemptive rights unless denied in the articles of incorporation. This change makes Texas law consistent with the corporate laws of most other states, including Delaware, and simplifies the certificate of formation for most corporations.

Section 21.205 allows a shareholder to waive the preemptive right and further provides that a written waiver is irrevocable.

Section 21.206 is a statute of limitations to bring an action for violation of a shareholder's preemptive right.

Section 21.207 limits the ability of a transferee of shares to make a claim for violation of a preemptive right.

Section 21.208 allows shareholders in an existing corporation to maintain existing preemptive rights subject to the limitations set forth in Sections 21.204, 21.206, and 21.207. It further provides a method for existing corporations to amend the certificate of formation to eliminate preemptive rights in the future.

Section 21.209 provides that shares and other securities of a corporation are transferable in accordance with Chapter 8 of the Texas Business and Commerce Code.

Section 21.210 provides the manner in which restrictions on the transfer or registration of a security may be imposed and provides the requirements for making a restriction effective against an existing holder of the security. No restriction is valid with respect to any security issued prior to the adoption of the restriction unless the holder of the security voted in favor of the restriction or was a party to the agreement imposing the restriction.

Section 21.211 identifies the types of restrictions on the transfer or registration of securities that will be considered valid, notwithstanding the provisions of Sections 21.210

and 21.213.

Section 21.212 provides a mechanism for filing a bylaw or agreement that restricts the transfer of securities with the Secretary of State and for incorporating such a restriction in the certificate of formation by amendment.

Section 21.213 contains general rules on the enforceability of restrictions on transfer of securities of a corporation and provides that an otherwise enforceable restriction is ineffective against a transferee for value without actual knowledge of the restriction at the time of transfer or against a subsequent transferee.

Section 21.214 provides certain rules by which a corporation can deal with securities registered on its books in the names of joint owners with the right of survivorship.

Section 21.215 provides that neither a corporation nor its officers, directors, employees, or agents will have any liability for treating the registered owner of shares as the owner for the purposes specified in Section 21.201 regardless of whether such person possesses a certificate for those shares.

Section 21.216 relieves a corporation from liability for a transfer of shares or the making of a distribution to a surviving joint owner under Section 21.214 before the corporation has received a claim from another person with respect to those shares or distributions.

Section 21.217 provides that an assignee or transferee in good faith and without knowledge that the full consideration for shares or a subscription has not been paid may not be held personally liable to the corporation or a creditor of the corporation for the unpaid portion of the shares or subscription for shares.

Section 21.218 sets forth the terms upon which shareholders of a corporation are entitled to inspect records of the corporation.

Section 21.219 requires a corporation to mail, upon written request, to a shareholder its annual financial statement and any more recent interim statements.

Section 21.220 imposes a penalty on the officer or agent of a corporation that fails to prepare the list of the corporation's shareholders and make it available as required by Sections 21.372 and 21.354.

Section 21.221 imposes on the corporation, rather than the officer or agent of the corporation, the penalty prescribed by Section 21.220 if the failure was due to the officer or agent not receiving notice of the meeting within sufficient time.

Section 21.222 imposes a penalty on a corporation for its failure to permit shareholders to inspect its records as required by section 21.218.

Section 21.223 specifies that a holder of shares, an owner of any beneficial interests in shares or a subscriber for shares, or any of their affiliates, may not be held liable to the corporation or its obligees for certain obligations in certain circumstances. The circumstances include a failure of the corporation to observe any corporate formality, on an alter ego theory or on the basis of actual or constructive fraud. The liability is not prevented or limited where the person perpetrated an actual fraud on the obligee primarily for the direct personal benefit of the person.

Section 21.224 provides that the limitation on liability in Section 21.223 is exclusive and preempts liability imposed under common law or otherwise.

Section 21.225 excludes from the limitations contained in Sections 21.223 and 21.224 obligations that are expressly assumed or guaranteed or for which the person is

otherwise liable under the Code or other applicable statute.

Section 21.226 specifies that a pledgee of shares is not personally liable as a shareholder. Likewise, an executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors or receiver is not personally liable, although the estate and funds administered by such person may be liable.

Subchapter F. Reductions in Stated Capital; Cancellation of Treasury Shares

Subchapter F contains provisions dealing with the manner in which stated capital may be reduced and treasury shares may be canceled. Outmoded and antiquated provisions of existing law requiring filing of statements of cancellation of redeemable shares, cancellation of treasury shares and reduction of stated capital have been deleted. Modern corporate laws have decreased any emphasis on the concepts of stated capital and generally eliminated public filings relating to changes in stated capital.

Section 21.251 provides that a redemption or purchase of redeemable shares by the issuing corporation effects a cancellation of those shares and, unless the certificate of formation provides otherwise, restores the shares to the status of authorized but unissued shares. It also states that, if the corporation is prohibited from reissuing shares acquired in a redemption or repurchase, the number of shares of the class is reduced by the number of cancelled shares. Upon the redemption or purchase, the stated capital of the corporation is reduced by the stated capital represented by the shares that are redeemed or purchased.

Section 21.252 sets forth the procedures by which treasury shares may be canceled.

Section 21.253 contains the procedures by which a corporation may reduce its stated capital by action of the board of directors and shareholders.

Section 21.254 imposes certain limitations on the reduction of stated capital that may be effected under this subchapter.

Subchapter G. Distributions and Share Dividends

Subchapter G contains provisions relating to distributions and share dividends.

Section 21.301 contains certain definitions that are used in this subchapter.

Section 21.302 gives the board of directors the authority to authorize distributions.

Section 21.303 places certain limitations on distributions that may be made by a corporation.

Section 21.304 contains requirements that relate to distributions that are effected by means of a redemption of shares, including requirements concerning how shares are chosen for redemption if less than all of the outstanding shares of the class are being redeemed and a requirement that the redemption be effected by call and written notice.

Section 21.305 describes the provisions to be included in a notice of redemption.

Section 21.306 provides that, if a corporation deposits, in a specified manner, the funds required to make a redemption, the shares called for redemption are deemed to cease to be outstanding at the redemption date.

Section 21.307 indicates that receipt of the redemptive price for certificated shares is conditioned upon surrender of the certificate and provides the terms upon which a redeeming corporation may appoint a transfer agent to pay the redemptive price.

Section 21.308 states that, in general, the obligation of a corporation created by the declaration of a distribution, and any indebtedness of a corporation issued in a distribution have the same priority as any other general, unsecured obligation of the corporation.

Section 21.309 authorizes a corporation to establish, increase, decrease, and abolish reserves out of its surplus.

Section 21.310 permits a board of directors to authorize a share dividend.

Section 21.311 places certain limits on share dividends that may be paid by a corporation.

Section 21.312 provides the method for valuing the shares issued in a share dividend.

Section 21.313 provides the mechanics for transferring surplus to stated capital in connection with a share dividend.

Section 21.314 specifies how a corporation's solvency, net assets, stated capital, and surplus are to be determined.

Section 21.315 provides the date as of which a determination of solvency, net assets, stated capital, and surplus are to be made for purposes of this subchapter.

Section 21.316 imposes liability on directors of a corporation that votes for a distribution that is prohibited by Section 21.303 and describes defenses available to a director for prohibited distributions.

Section 21.317 is the statute of limitations with respect to actions against a director for a prohibited distribution.

Section 21.318 provides for contribution from a shareholder who knowingly received a wrongful distribution and from any director also liable for the distribution to achieve equity and provides that this is the only liability of a shareholder of a corporation for receiving prohibited distributions, except for claims under the U.S. Bankruptcy Code or the fraudulent transfer statute in Chapter 24, Business & Commerce Code.

Subchapter H. Shareholders' Meetings; Voting and Quorum

Subchapter H contains provisions relating to meetings of shareholders, including voting and quorum requirements.

Section 21.351 requires the holding of an annual meeting of shareholders of a corporation (except certain investment companies) but provides that the failure to hold an annual meeting does not result in the winding up or termination of the corporation. It also gives to a shareholder the right to petition a court to order an annual meeting. Although implicit in existing law, this Section clarifies that no annual meeting may be ordered if the annual meeting has been effectively held by written consent of the shareholders. The Section also requires the shareholder to request the corporation to hold an annual meeting before attempting to obtain a court order to that effect, which is a change from existing law.

Section 21.352 authorizes the manner in which a special meeting of shareholders may be called and limits the business that may be conducted at a special meeting.

Section 21.353 requires that, subject to certain exceptions, written notice of a meeting of shareholders be given to all shareholders entitled to vote at the meeting no later than ten days and no earlier than 60 days before the meeting. It also requires that a notice of a special meeting of shareholders contain a statement of the purpose for which

the meeting is called.

Section 21.354 permits any shareholder to inspect the list of shareholders entitled to vote at a meeting, which is required to be prepared by Section 21.372, and requires the list to be produced and available at the meeting. This section also states that the original share transfer records of a corporation are prima facie evidence of the shareholders entitled to inspect the list.

Section 21.355 mandates that the stock transfer records of a corporation that, in accordance with Section 6.101, closes its stock transfer records for purposes of determining the shareholders entitled to vote at a meeting of shareholders are to remain closed for at least ten days immediately preceding the meeting.

Section 21.356 states that the record date for determining shareholders entitled to execute a written consent to action on a matter, as established in accordance with Section 6.102(a), may not be more than ten days after the date on which the board of directors adopts the resolution setting the record date.

Section 21.357 states that the record date for determining shareholders that is selected under Section 6.101, which is a record date for any purpose other than a written consent to action, must be at least ten days before the date on which the action for which the record date is determined is to be taken.

Section 21.358 specifies that the holders of a majority of the shares entitled to vote at a meeting that are present, in person or by proxy, is a quorum unless the certificate of formation provides a different measurement that is permitted by this section. This section also provides that, in general, once a quorum is present at a meeting, business may continue to be conducted at the meeting despite the subsequent departure or refusal to vote of shareholders. It also gives the shareholders of a corporation the right to adjourn any meeting at which a quorum is not present.

Section 21.359 provides that directors are elected by a plurality vote unless a different measurement is provided by the certificate of formation or bylaws in accordance with this section.

Section 21.360 provides that cumulative voting is not permitted in the election of directors unless expressly permitted in the certificate of formation of a corporation formed after the effective date of the code or expressly denied in the certificate of formation of a corporation formed before the effective date of the code. This is a change from existing law, which provides that cumulative voting is available to shareholders unless the certificate of formation expressly denies it. This change makes Texas law consistent with the laws of most other states, including Delaware.

Section 21.361 provides the mechanics for how the right to cumulatively vote is exercised.

Section 21.362 provides that the shareholders of a corporation that exists prior to the date the code becomes effective will continue to have the right to vote cumulatively in the election of directors unless the right was denied in the corporation's certificate of formation or the certificate of formation is later amended to deny the right.

Section 21.363 provides that, in general, the vote required to approve any matter (other than the election of directors) is the affirmative vote of the holders of a majority of the shares entitled to vote on such matter who actually vote for, against, or abstain on such matter at a meeting at which a quorum is present. This section also permits this general requirement to be modified in certain ways in the certificate of formation or bylaws.

Section 21.364 provides that, in general, the vote required to approve a fundamental action is the affirmative vote of the holders of two-thirds of the outstanding

shares entitled to vote on such action. It also contains provisions relating to when separate class or series voting is required and permits the certificate of formation or bylaws to alter, within certain parameters, the voting requirements set forth in the code. Fundamental actions are defined to include amendments to the certificate of formation, voluntary winding up and termination, and the revocation of voluntary winding up and termination.

Section 21.365 indicates how the vote required for certain matters may be altered.

Section 21.366 provides that, unless altered by the certificate of formation, each outstanding share, regardless of class, has one vote on each matter submitted to a vote of shareholders and provides that, when shares have more or less than one vote per share, references in the code to a specified portion of the shares should be read as a reference to the specified portion of the votes.

Section 21.367 permits a shareholder to vote by proxy and sets forth the manner in which a proxy may be executed. This section expands existing law by specifically permitting a proxy by electronic and telephonic transmission so long as it is accompanied by information that verifies it was authorized by the shareholder. This change is consistent with the trend of modern corporate law and similar to Delaware corporate law.

Section 21.368 provides that a proxy is not effective for more than 11 months unless it otherwise provides.

Section 21.369 states that a proxy is always revocable unless it states that it is irrevocable and is coupled with an interest. The section also indicates certain circumstances that are deemed to create a proxy that is coupled with an interest.

Section 21.370 permits an irrevocable proxy to be specifically enforced under the circumstances specified in that section.

Section 21.371 authorizes a corporation to establish procedures for determining the validity of a proxy in its bylaws.

Section 21.372 request a corporation to prepare a listing of shareholders entitled to vote at a shareholder meeting not later than the 11th day before the date of the meeting. The required contents of the shareholders list is also set forth. Failure to comply does not affect the validity of any action taken at the meeting. The original share transfer records are prima facie evidence of the shareholders entitled to vote at the meeting.

Subchapter I. Board of Directors

Subchapter I contains provisions relating to the board of directors of a corporation that are supplemental to the provisions with respect to governing persons found in Title I.

Section 21.401 provides that a corporation is to be governed by a board of directors except as provided by Section 21.101 (shareholders' agreements) or Subchapter O (close corporations).

Section 21.402 generally negates residency or shareholder status as necessary qualifications for directors and permits the certificate of formation and bylaws to specify qualifications.

Section 21.403 specifies that there must be at least one director and provides how the actual number of directors must be set.

Section 21.404 requires the certificate of formation to include the names of the initial board of directors.

Section 21.405 states that directors will be elected at each annual meeting of

shareholders and authorizes a certificate of formation to provide the holders of a class or series to elect one or more directors.

Section 21.406 permits a director elected by the holders of a class or series of shares to cast more or less than one vote and provides that references in the code to voting by directors are to be interpreted in accordance with such a provision.

Section 21.407 provides that the term of a director is generally until the next annual meeting of shareholders and the date the director's successor is elected and qualified.

Section 21.408 permits the certificate of formation or bylaws to divide the directors into two or more classes that have staggered terms and provides the mechanics for effecting such a provision.

Section 21.409 specifies the terms on which directors may be removed. It clarifies that shareholders have the right to remove directors with or without cause unless otherwise provided in the certificate of formation or bylaws. This change makes Texas law in this area consistent with Delaware corporate law and the Model Business Corporation Act.

Section 21.410 provides the manner in which vacancies on the board of directors may be filled.

Section 21.411 specifies the notice requirements for meetings of the board of directors.

Section 21.412 specifies the terms upon which notice of a meeting of the board of directors may be waived. This Section clarifies that a written waiver of notice of a directors' meeting is effective, which conforms with current legal practice but was not clear in existing law.

Section 21.413 specifies the manner in which a quorum of the board of directors is determined.

Section 21.414 states that a director who is present at a meeting of the board of directors is presumed to have consented to any action taken at such meeting unless the director takes certain specified steps to negate that presumption.

Section 21.415 specifies the vote required for a board of directors to take action on any matter.

Section 21.416 authorizes the board of directors to create committees, places certain limits on the authority of such a committee, and sets forth certain mechanics for the operation of such a committee.

Section 21.417 requires the board of directors to elect a president and secretary of a corporation and authorizes it to elect other officers.

Section 21.418 contains provisions that validate a transaction between a corporation and a director or officer or an affiliate of the director or officer if certain procedures are followed.

Subchapter J. Fundamental Business Transactions

Subchapter J contains provisions relating to how for-profit corporations approve mergers, conversions, interest exchanges, and sales of all or substantially all of the corporation's assets, which transactions are defined as fundamental business transactions in Section 1.102.

Section 21.451 contains the definitions of certain terms that are used in Subchapter J.

Section 21.452 sets out the procedures by which a corporation approves a merger.

Section 21.453 sets out the procedures by which a corporation approves a conversion.

Section 21.454 sets out the procedures by which a corporation approves an interest exchange.

Section 21.455 sets out the procedures by which a corporation approves a sale of all or substantially all of its assets.

Section 21.456 sets out the general procedures by which a corporation submits a fundamental business transaction to shareholders for approval.

Section 21.457 specifies the vote of shareholders generally necessary to approve a fundamental business transaction.

Section 21.458 requires class voting on certain fundamental business transactions.

Section 21.459 specifies circumstances under which no shareholder approval is required for a fundamental business transaction.

Section 21.460 grants to shareholders the rights of dissent and appraisal, which are contained in Subchapter H of Chapter 10, with respect to fundamental business transactions.

Section 21.461 authorizes the board of directors to cause the corporation to pledge or mortgage the corporation's assets without shareholder approval unless required by the certificate of formation.

Section 21.462 authorizes the board of directors to cause the corporation to convey its real property.

Subchapter K. Winding Up and Termination

Subchapter K contains provisions that supplement Chapter 11 with respect to the winding up and termination of a for-profit corporation.

Section 21.501 states that a corporation must approve a voluntary winding up permitted by Chapter 11, a cancellation of an event requiring winding up under Section 11.152, a revocation of a voluntary decision to wind up permitted by Section 11.151, and a reinstatement of the corporation permitted by Section 11.202.

Section 21.502 specifies procedures by which a corporation may approve a voluntary winding up permitted by Chapter 11, a cancellation of an event requiring winding up under Section 11.152, a revocation of a voluntary decision to wind up permitted by Section 11.151, and a reinstatement of the corporation permitted by Section 11.202. If the corporation has not commenced business and has not issued any shares, a majority of the incorporators or the board of directors must adopt a resolution to wind up, to reinstate, to cancel, or to revoke a voluntary decision to wind up. If shares have been issued, all shareholders may consent in writing to a winding up, a reinstatement, a cancellation, or a revocation of voluntary decision to wind up. Alternatively, the board of directors may adopt a resolution recommending winding up, reinstatement, cancellation or revocation of a voluntary decision to wind up and submit it to the shareholders for approval at an annual or special meeting of shareholders. The shareholders must approve such a recommendation in accordance with Section 21.503.

Section 21.503 specifies the requirements for the notice of a meeting of shareholders to consider the winding up, reinstatement, a cancellation, or revocation of the voluntary decision to wind up of a corporation. Section 21.503 also specifies the vote of shareholders required at such a meeting for approval of a winding up, reinstatement, cancellation or revocation of voluntary decision to wind up. A resolution to wind up, reinstate, cancel or revoke a voluntary decision to wind up must be approved by the affirmative vote required by Section 21.362 (generally, two-thirds of the outstanding shares entitled to vote on the action).

Section 21.504 specifies that the directors of the corporation must manage the process of winding up its business or affairs. This Section is a clarification of existing law.

Subchapter L. Derivative Proceedings

Subchapter L contains provisions relating to derivative proceedings by shareholders of corporations.

Section 21.551 contains definitions specifically applicable to this Subchapter.

Section 21.552 states the requirements for a shareholder to have standing to bring a derivative proceeding under this subchapter.

Section 21.553 states the requirement that, with certain exceptions, a written demand must have been filed with the corporation and a 90-day waiting period must have expired prior to a shareholder filing a derivative proceeding under this Subchapter.

Section 21.554 provides that a determination of how to proceed on allegations made in a demand or petition relating to a derivative proceeding must be made under specified conditions by affirmative vote of (1) a majority of independent and disinterested governing persons present at a meeting of only disinterested governing persons, (2) the majority of a committee of two or more independent and disinterested persons appointed by a majority of independent and disinterested governing persons present at a meeting of the governing authority, or (3) a panel of one or more independent and disinterested persons appointed by a court on motion of a corporation. This section also provides the standards for court appointment of such a panel and limits the liability of persons appointed to such a panel.

Section 21.555 provides that if a corporation that is the subject of a derivative proceeding commences an inquiry into the allegations made in the demand or petition and the persons described in Section 21.554 are conducting an active review of the allegations in good faith, the court shall stay the derivative proceeding until the review is complete and the persons have determined what further action, if any, should be taken. The section further provides for review of the stay for continued necessity every 60 days.

Section 21.556 states limits on discovery by a shareholder after the filing of a derivative proceeding under this Subchapter if the corporation proposes to dismiss the derivative proceeding under Section 21.558.

Section 21.557 provides that a written demand filed with the corporation under Section 21.553 tolls the statute of limitations on the underlying claim until the earlier of the 91st day after the date of the demand or the 31st day after the date that the corporation advises the shareholder that the demand has been rejected or the review completed.

Section 21.558 requires a court to dismiss a derivative proceeding on a motion by the corporation if the persons described in Section 21.554 determine in good faith, after conducting a reasonable inquiry and based on factors they consider appropriate under the circumstances, that continuation of the derivative proceeding is not in the best interests of the corporation. The Section also states the burden of proof for such a motion.

Section 21.559 provides that if a derivative proceeding is instituted after a demand is rejected, the petition must allege with particularity facts that establish that the rejection was not made in accordance with the requirements of Sections 21.554 and 21.558.

Section 21.560 provides that a derivative proceeding may not be discontinued or settled without court approval and also that the court direct that notice be given to shareholders whose interests the court determines may be substantially affected by a proposed discontinuance or settlement.

Section 21.561 states the requirements for a court to order the payment by another party of the reasonable expenses incurred by a party in a derivative proceeding.

Section 21.562 states the extent of the application of this Subchapter and of the laws of its jurisdiction of organization to derivative proceedings brought in the right of a foreign corporation.

Section 21.563 provides that in the case of a "closely held corporation" having fewer than 35 shareholders and no shares listed on a national securities exchange or regularly quoted in an over-the-counter market, the provisions of Sections 21.552 through 21.559 do not apply except that, if justice requires, a derivative proceeding brought by a shareholder may be treated by a court as a direct action brought by the shareholder for the shareholder's own benefit and any recovery by the shareholder may be paid directly to the plaintiff or to the corporation if necessary to protect the interests of creditors or other shareholders of the corporation.

Subchapter M. Affiliated Business Combinations

Subchapter M contains provisions governing certain business combinations between an "issuing public corporation" and certain of its affiliates. The provisions are derived from Articles 13.01 through 13.08 of the TBCA and are substantively the same.

Section 21.601 contains the definitions of "issuing public corporation," "shares acquisition date," "subsidiary," and "voting shares," as such terms are used in this subchapter.

Section 21.602 defines "affiliated shareholder" for purposes of this subchapter.

Section 21.603 contains a definition of "beneficial owner" as used in this subchapter.

Section 21.604 contains a definition of "business combination" as used in this subchapter.

Section 21.605 contains a definition of the term "control" as used in this subchapter.

Section 21.606 establishes a three-year moratorium on business combinations between an issuing public corporation and an affiliated shareholder.

Section 21.607 sets forth the circumstances under which the three-year moratorium imposed by Section 21.606 are inapplicable.

Section 21.608 makes clear that subchapter M does not affect the validity of or prevent any action other than a business combination and that the board of directors does not have any liability based on whether an election is made or not made under subchapter M.

Section 21.609 states that subchapter M controls over any conflicting provision elsewhere in the Code.

Section 21.610 specifies that the required shareholder vote may be increased but not decreased under Section 21.365.

Subchapter N. Provisions Relating to Investment Companies

Subchapter N contains provisions that relate only to corporations that are registered as open-end companies under the Investment Company Act.

Section 21.651 defines the term "investment company" as used in Subchapter N.

Section 21.652 permits the board of directors of an investment company to take certain actions with respect to creating classes and series of shares and increasing and decreasing the number of shares within a class or series that are in addition to those permitted elsewhere in the Code.

Section 21.653 provides that a statement concerning any class or series of shares that is modified by the board of directors of an investment company as contemplated by Section 21.652 must be filed with the Secretary of State and specifies the content of that statement.

Section 21.654 states that the term of a director of an investment company is the term for which the director is elected and until the successor is elected and qualified. As a result, the typical one-year term is not applicable to investment companies. This is to permit investment companies to hold elections only when mandated by the Investment Company Act.

Section 21.655 states that, if provided in the certificate of formation or bylaws, an investment company need not hold annual meetings of shareholders or elect directors in a year in which an election is not required by the Investment Company Act.

Subchapter O. Close Corporation

Subchapter O contains provisions relating to the creation, governance, and treatment of a close corporation.

Section 21.701 contains the definitions of "close corporation," "close corporation provision," "ordinary corporation," and "shareholders' agreement." "Close corporation provision" is a new definition that refers to provisions contained in a certificate of formation or shareholders' agreement of a close corporation.

Section 21.702 indicates that Subchapter O applies only to close corporations and that the remaining provisions of the Chapter apply to close corporations to the extent not inconsistent with Subchapter O.

Section 21.703 states that a close corporation is to be formed in accordance with Chapter 3.

Section 21.704 states that bylaws need not be adopted if the provisions required by law to be in the bylaws are in the certificate of formation or a shareholders' agreement. A close corporation terminating its close status must adopt bylaws.

Section 21.705 describes the procedure by which an ordinary corporation may become a close corporation and requires the affirmative vote of all of the shareholders.

Section 21.706 permits a surviving or new corporation resulting from a merger or conversion, or a corporation that acquires a corporation in an interest exchange, to become a close corporation. Approval of all of the shareholders of each corporation is required.

Section 21.707 continues the close corporation status of an existing corporation

that elected to become a close corporation before the effective date of the code, and provides that the existing agreement among the shareholders is considered to be a shareholders' agreement. However, any share certificate representing shares of the close corporation issued or delivered after the effective date of the code must conform with the code requirements.

Section 21.708 describes the procedure for elective termination of close corporation status by filing a statement of termination, amending the certificate of formation to delete the statement that it is a close corporation, or by engaging in a merger, interest exchange, or conversion unless the plan provides that the surviving or new corporation will continue as or become a close corporation. Status as a close corporation would also be terminated when decreed in a judicial proceeding to enforce a provision providing for termination.

Section 21.709 provides that a time or event specified in a close corporation provision requiring termination of close corporation status will have the effect of terminating that status. After the time or occurrence of the event, a statement of termination of close corporation status must be signed by an officer on behalf of the close corporation and filed with the Secretary of State. The section specifies the required contents of the statement of termination and requires that a copy be delivered or mailed to each shareholder.

Section 21.710 addresses the effects of termination of close corporation status on the corporation.

Section 21.711 provides the procedure for calling a shareholders' meeting after termination of a close corporation status for the purpose of electing directors.

Section 21.712 provides the term of directors succeeding to management of a former close corporation and directs that shareholders act as directors until directors are elected.

Section 21.713 describes the management alternatives for close corporations.

Section 21.714 provides for shareholders' agreements in close corporations and describes generally how the business and affairs of a close corporation or the relationships among the shareholders may be regulated by such an agreement. TBCA allows for arbitration of issues when the decision makers are deadlocked, and this section adds mediation as an additional means of dispute resolution.

Section 21.715 specifies who is required to sign a shareholders' agreement and generally requires all shareholders or subscribers, whether or not they have voting rights, to execute a shareholders' agreement in a close corporation.

Section 21.716 provides the procedure for amending the shareholders' agreement in a close corporation.

Section 21.717 details the requirements of delivery of a shareholders' agreement to various persons affected and states that failure to deliver the agreement will not invalidate the shareholders' agreement.

Section 21.718 requires a close corporation that conducts its business and affairs under a shareholders' agreement to file a statement of operation with the Secretary of State and provides that this filing causes the fact that the close corporation conducts its business and affairs under a shareholders' agreement to be a matter of public record.

Section 21.719 provides that a shareholders' agreement is enforceable despite the fact that it eliminates the board of directors, imposes restrictions on the authority of the board of directors, or treats the affairs of the close corporation as if it were a partnership. It also authorizes a close corporation, any of its shareholders, or any party to a

shareholders' agreement to seek to enforce the shareholders' agreement.

Section 21.720 provides that a shareholders' agreement that is executed as provided in Section 7.15 is binding on all shareholders and assignees of shares, regardless of whether such shareholder or assignee had knowledge of the shareholders' agreement.

Section 21.721 requires a shareholder of a close corporation to deliver a copy of the shareholders' agreement before making a transfer of shares but makes clear that the failure to do so does not invalidate the enforceability of the shareholders' agreement.

Section 21.722 states that each holder of or other person claiming an interest in shares of a close corporation is presumed to have knowledge of a close corporation provision that exists at the time of transfer if a certificate representing those shares contains the statement required by Section 21.732 and the shareholders' agreement was delivered as required by Section 21.717.

Section 21.723 specifies the manner in which a person ceases to be a party to and bound by a shareholders' agreement and the consequences of such cessation.

Section 21.724 provides when a shareholders' agreement terminates.

Section 21.725 states that Sections 21.726 through 21.729 apply only to close corporations that are not managed solely by the board of directors but are instead at least partly managed by shareholders or other persons.

Section 21.726 states that shareholders of a corporation described in Section 21.725 are considered to be directors under Chapter 21, other than with respect to provisions relating to the election and removal of directors and the procedure for making filings that require a statement that a specified action has been taken by the board of directors.

Section 21.727 imposes on the shareholders of a corporation described in Section 21.725, in connection with the exercise of managerial acts or omissions by the shareholders or other persons who manage the close corporation, the liabilities imposed on directors of corporations.

Section 21.728 states that actions normally taken by the board of directors of a corporation may be taken by the shareholders of a corporation described in Section 21.725 at a meeting or without a meeting as permitted by the shareholders' agreement, subchapter O, or chapter 21. It also sets out the means by which shareholders may authorize an action, including by actual majority vote or by unanimous consent, which need not be written but may be demonstrated in one of the specified ways.

Section 21.729 negates the liability of a shareholder of a close corporation described in Section 21.725 with respect to any matter approved by the shareholders or other persons who manage the corporation pursuant to the shareholders' agreement if the shareholder did not have the right to vote on the matter or dissented from and did not vote for such matter.

Section 21.730 states that the fact that a close corporation fails to follow the normal formalities observed by most corporations may not be used to impose personal liability on the shareholders, invalidate the shareholders' agreement, or affect the status of the close corporation as a corporation. This protection now applies to all close corporations and is no longer limited to close corporations described in Section 21.725, which is the case under TBCA Article 12.37.

Section 21.731 provides that the provisions of Sections 21.713 through 21.730 do not prohibit or impair any other agreement between shareholders of an ordinary corporation permitted by law.

Section 21.732 contains supplemental provisions concerning the information required on certificates that represent shares of a close corporation and states that the failure to include such information does not affect the close corporation's status as such.

Subchapter P. Judicial Proceedings Relating to Close Corporations

Subchapter P contains provisions relating to the filing of various judicial proceedings relating to close corporations, such as those intended to enforce the close corporation provision, appoint a provisional director, or appoint a custodian for the corporation.

Section 21.751 provides general definitions for use in interpreting the provisions of Subchapter P.

Section 21.752 provides that, in addition to any other judicial proceedings that may be brought by a corporation, a close corporation may institute a proceeding intended to enforce a close corporation provision, appoint a provisional director, or appoint a custodian for the corporation.

Section 21.753 sets forth notice requirements for judicial proceedings relating to close corporations and authorizes the corporation or a shareholder thereof to intervene in the proceeding.

Section 21.754 provides that the right of a close corporation or a shareholder thereof to institute a judicial proceeding is in addition to any other lawful right or remedy available to the plaintiff.

Section 21.755 prohibits a shareholder of a close corporation from instituting a judicial proceeding before exhausting any non-judicial remedy set forth in a close corporation provision regarding dispute resolution unless irreparable harm will result before a non-judicial remedy is exhausted. Section 21.755 also prohibits a shareholder of a close corporation from instituting a proceeding seeking damages or other monetary relief if the shareholder is entitled to dissent and receive the fair value of the shares under the code or a shareholders' agreement.

Section 21.756 provides that in a judicial proceeding brought to enforce a close corporation provision, the court must enforce the provision regardless of whether there is an adequate remedy at law. Section 21.756 further authorizes the court to enforce the provision by any fair and equitable means, including damages, specific performance, the appointment of a provisional director, custodian, or receiver, the liquidation of the assets of the corporation, and the termination of close corporation status. The court may not, however, order termination of close corporation status unless no other remedy at law is adequate and the size, nature of the business, or number of or relationship between the shareholders is such as to make the continuation of close corporation status wholly impractical.

Section 21.757 provides that when a shareholder is entitled to wind up and terminate a close corporation under a shareholders' agreement, the court may not order liquidation, involuntary termination, or receivership unless no other remedy at law is adequate.

Section 21.758 requires the court to appoint a provisional director for the corporation "upon presentation of proof that the persons empowered to manage the corporation are so divided, with respect to the management of the business and affairs of the corporation, that the business and affairs are not being conducted in a manner that is to the general advantage of the shareholders." The section further requires the provisional director to be an impartial person and enables the court to determine any further qualifications. The section also provides that the provisional director serve until removed by court order or by a vote of the requisite majority of directors or shareholders as provided in the relevant close corporation provisions.

Section 21.759 provides that a provisional director has all the rights and powers of a duly elected director or a shareholder, if the shareholders have been empowered to manage the business under a shareholders' agreement.

Section 21.760 provides that the compensation of a provisional director will be determined by agreement between the director and the close corporation; provided, however, that the court may set the compensation in the absence of agreement or in the case of a disagreement between the director and the corporation.

Section 21.761 requires the court to appoint a custodian for the corporation upon presentation of proof that (i) the shareholders are so divided as not to be able to elect successor directors to replace those whose terms have expired or would have expired upon qualification of a successor, (ii) the business of the corporation is so divided with respect to their views on the management of the business and affairs of the corporation, that the votes or consents required to take action on behalf of the corporation cannot be obtained and any deadlock remedy provision has failed, or (iii) the plaintiff or intervenor has the right to wind up and terminate the corporation under a shareholders' agreement. The section further requires the custodian to comply with the qualifications required to serve as a receiver under Section 11.406.

Section 21.762 provides that a custodian has the same powers and duties as granted to a receiver appointed under Sections 11.404 through 11.406 of the Code. The section requires that the custodian continue the business of the corporation and not liquidate the corporation except as provided by court order or Section 21.761(a)(3).

Section 21.763 requires that if the condition requiring the appointment of the custodian is remedied through means other than winding up and termination, then the custodianship will be immediately terminated and management of the corporation will be returned to the shareholders, directors, or other persons empowered to manage the corporation's business, as appropriate.

Subchapter Q. Miscellaneous Provisions

Subchapter Q contains miscellaneous provisions that apply to for-profit corporations.

Section 21.801 states that, except as otherwise provided by the Code, shares and other securities of a corporation are personal property.

Section 21.802 provides for penalties if a corporation does not file a change of registered office or agent, a certificate of voluntary withdrawal or a certificate of termination within thirty (30) days after the date of the change, withdrawal or termination or the date the filing is otherwise required by law. The civil penalty may not exceed \$2,500.00 for each violation. The attorney general can bring suit to recover the civil penalty or enjoin a person from violating this Section. A plaintiff in an action or proceeding may bring suit to recover reasonable costs and attorney's fees incurred to locate and effect service of process on the violating person.

CHAPTER 22. NONPROFIT CORPORATIONS

Chapter 22 codifies the provisions relating to nonprofit corporations currently located in Art. 1396-1.01 *et seq.* This subtitle utilizes the new terminology of the Code and, except as noted below, is a nonsubstantive codification. Obsolete transitional provisions enacted with the TNPCA in 1959 have been eliminated.

Subchapter A. General Provisions

Section 22.001 defines the following terms: board of directors, bylaws, corporation, foreign corporation, nonprofit corporation, and ordinary care.

Section 22.002 imposes limits on meetings by remote electronic communications systems. Participants must consent to the meeting being held in that manner and be able to communicate concurrently with each other participant.

Subchapter B. Purposes and Powers

Section 22.051 allows a nonprofit corporation to be formed for any lawful purpose.

Section 22.052 contains the provisions relating to creation of a nonprofit corporation as a dental health service corporation.

Section 22.053 prohibits a corporation created under this Chapter from paying dividends or distributing income to its members, directors, or officers.

Section 22.054 authorizes a corporation to pay reasonable compensation for services rendered, confer benefits upon its members in conformity with its purposes, and make distributions to members as permitted under this Chapter upon winding up and termination.

Section 22.055 prohibits a corporation from making loans to its directors and restricts the authority of the corporation to make loans to officers to specified circumstances and amounts.

Section 22.056 provides that nonprofit corporations may be formed that are jointly owned, managed and controlled by doctors of medicine, osteopathy and podiatry under certain circumstances. The section also limits the authority of each type of practitioner to practice within the scope of their respective licenses.

Subchapter C. Formation and Governing Documents

Section 22.101 allows an existing nonprofit organization to incorporate with the consent of a majority of its members.

Section 22.102 authorizes the board of directors or, members if the corporation is member-managed, to adopt bylaws for the regulation of management of the affairs of the corporation not inconsistent with law of the certificate of formation. Bylaws may be amended or repealed by the directors unless the certificate of formation or this chapter reserves the power to the members, management is vested in the members, or the bylaws expressly provide that the directors may not amend or repeal the bylaws.

Section 22.103 provides that a provision of the certificate of formation that is inconsistent with a bylaw controls over the bylaw except a change in the number of directors by an amendment to the bylaws controls unless the certificate of formation specifically provides that a change in the number of directors may be made only by amendment.

Section 22.104 requires the organizers or directors to call and give notice of an

organizational meeting of the board of directors for the purpose of adopting bylaws, electing officers, and such other purposes as may come before the meeting. If the corporation is member-managed, the organizers shall call and give notice of an organizational meeting of the members.

Section 22.105 outlines the procedure for amending the certificate of formation when there are members having voting rights. The procedure requires the board of directors to adopt a resolution to amend and directing that the amendment be submitted to a vote of the members. Written notice of the meeting is required and the proposed amendments shall be adopted on receiving at least two-thirds of the votes of the members present at the meeting.

Section 22.106 outlines the procedure for amendment when the management of the affairs of the corporation is vested in the corporation's members under Section 22.202.

Section 22.107 outlines the procedure for amendment by the board of directors when the corporation has no members or no members having voting rights, or for limited purposes without membership approval. These purposes include action taken to extend the duration; delete the names and addresses of the initial directors; delete the registered agent information, if a statement of change is on file with the secretary of state; or change the name of a corporation to delete or substitute one of the words or abbreviations on incorporation, or by adding, deleting or changing a geographical attribution to the name.

Section 22.108 specifies that more than one amendment may be voted on at any one meeting of the members.

Subchapter D. Members

Section 22.151 authorizes a nonprofit corporation to have one or more classes of members or no members. Such designation of classes to be set forth in the certificate of formation or bylaws. The section allows a nonprofit corporation to issue instruments evidencing membership, voting or ownership rights.

Section 22.152 provides that the members shall not be personally liable for the debts, liabilities, or obligations of the corporation.

Section 22.153 requires a corporation to have an annual meeting of the members as fixed in the bylaws unless the bylaws require more than one regular meeting of members each year.

Section 22.154 gives a member the right to make demand on the corporation to hold an annual meeting, and authorizes legal action to compel the holding of such annual meeting. Further, the section specifies that the failure to hold an annual meeting shall not cause a winding up and termination of the corporation.

Section 22.155 allows special meetings of the corporation to be called by the president, board of directors, by members having not less than one-tenth of the voting rights, and other officers or persons as authorized in the certificate of formation or bylaws.

Section 22.156 directs a corporation, other than a church, to provide written or printed notice of a meeting to each member entitled to vote stating the time and place of the meeting, and in the case of a special meeting, the purpose of the meeting. Notice of members of a church is considered sufficient if announced at a regularly scheduled worship service or as otherwise provided in the certificate of formation or bylaws.

Section 22.157 allows a corporation to adopt a bylaw that provides that notice of an annual or regular meeting is not required. A corporation with more than 1,000 members may, if permitted by the bylaws, provide notice of the meeting through

publication.

Section 22.158 mandates that a corporation shall, after fixing a record date for a meeting, prepare a list of voting members identifying those members entitled to notice, those members not entitled to notice of the meeting, the address of each voting member and the number of votes each voting member is entitled to cast. Such list must be available for inspection and copying by any member entitled to vote not later than two business days after notice is given, and must also be available at the meeting.

Section 22.159 specifies that unless otherwise provided in the certificate of formation or bylaws, members holding one-tenth of the votes shall constitute a quorum. A vote of the majority of the votes entitled to be cast shall be the act of the members unless a greater vote is required by law, the certificate of formation, or the bylaws. In the case of a church formed prior to May 12, 1959, the effective date of the TNPCA, the members present at a meeting shall constitute a quorum.

Section 22.160 specifies that each member shall be entitled to one vote except to the extent that voting rights are limited, denied or enlarged by the certificate of formation or bylaws. Further, the section allows members to vote by proxy unless the certificate of formation or bylaws otherwise provide. The period for which a proxy may be irrevocable is limited to 11 months. The default provisions provide that, unless otherwise provided in the proxy, the proxy is revocable and expires 11 months after execution. The certificate of formation or bylaws may authorize elections to be conducted by mail, by facsimile, by electronic message or by a combination of those methods.

Section 22.161 provides that the members of the corporation may vote in person or by proxy for as many persons as there are directors to be elected. If expressly authorized by the certificate of formation, a member may cumulate the member's vote for directors after giving written notice of the intention to cumulate votes.

Section 22.162 allows a corporation to mandate a greater voting requirement for actions of members than stated in the Subtitle so long as the greater requirement is set forth in the certificate of formation.

Section 22.163 outlines the procedures for fixing the record date for determining members entitled to vote at a meeting or an adjournment of the meeting.

Section 22.164 combines into one section the similar voting requirements found in multiple sections of existing law. For any "fundamental action," the vote required for approval is generally at least two-thirds of the votes that members present in person or by proxy are entitled to cast at the meeting. Voting by class of members on the fundamental action may also be required.

Subchapter E. Management

Section 22.201 provides that the affairs of a corporation shall be managed by a board of directors and that the board may be designated by any name.

Section 22.202 allows a corporation to vest management in its members. The certificate of formation or bylaws may also limit the authority of the board. A corporation is considered to have vested management in its board of directors in the absence of a provision in the certificate of formation or bylaws otherwise unless the corporation is a church operating under a congregational system incorporated before January 1, 1994 and is member-managed.

Section 22.203 provides that a director is not required to be a resident of this state or a member of the corporation unless the certificate or bylaws of the corporation imposes that requirement. The certificate or bylaws may prescribe other qualifications for directors.

Section 22.204 requires that the number of directors shall be not less than three (3) and otherwise fixed in the manner provided in the certificate of formation or bylaws. Further, the section provides that the number of the initial board of directors be set by the certificate of formation. The number of directors may be increased or decreased by amendment to the certificate of formation or bylaws.

Section 22.205 mandates that the certificate of formation name the initial directors.

Section 22.206 provides that the directors, other than the initial directors, shall be elected, appointed or designated in the manner and for the terms specified in the certificate of formation or bylaws.

Section 22.207 allows the directors to be elected by an association or corporation if there are no members having voting rights and the certificate of formation or bylaws provided for that election. The directors of a religious, charitable, educational or eleemosynary corporation may be affiliated with, elected or controlled by another incorporated or unincorporated convention, conference or association.

Section 22.208 provides that the term of the initial directors is until the first annual election of directors or for the period specified in the certificate of formation or bylaws. Other directors hold office for the term provided in the certificate of formation or bylaws. Unless otherwise provided, a director holds office until a successor is elected, appointed or designated and qualified.

Section 22.209 permits a corporation to divide directors into classes. The terms of office of each class are not required to be uniform.

Section 22.210 authorizes a corporation to have ex officio members of the board. Such members are entitled to receive notice of board meetings and attend meetings but do not have voting rights unless entitled under the certificate of formation or bylaws. If the member does not have voting rights, the member does not have the duties or liabilities of a director.

Section 22.211 permits a corporation to remove any director from office in the manner provided in the certificate of formation or bylaws. In the absence of a provision for removal, a director may be removed from office, with or without cause, by the persons entitled to elect, designate, or appoint the director.

Section 22.212 authorizes a corporation to fill a vacancy in the board of directors by affirmative vote of a majority of the remaining directors. Further, the section allows any directorship created by reason of an increase in the number of directors to be filled at an election at an annual or special meeting of the members, or if no members have voting rights in the manner provided in the certificate of formation or bylaws.

Section 22.213 provides that a quorum of directors is a majority of the directors fixed by the bylaws, stated in the certificate of formation, or three, whichever is less. This section specifically provides that directors present by proxy may not be counted toward a quorum.

Section 22.214 specifies that the act of the majority of the directors at a meeting at which a quorum is present is the act of the board of directors unless the certificate of formation requires the vote or concurrence of a greater number.

Section 22.215 sets forth the proxy provisions for directors. A director may vote by proxy if permitted in the certificate of formation or bylaws and the proxy is executed in writing.

Section 22.216 specifies that a director's proxy expires three months after the date the proxy is signed and is revocable unless otherwise provided by the proxy or made

irrevocable by law.

Section 22.217 sets forth the requirements for notice for director's meetings.

Section 22.218 permits a corporation by resolution of the board of directors to designate one or more committees consisting of at least two members to have and exercise the authority of the board of directors in the management of the corporation. The majority of the persons on the committee must be directors. Designation of a committee does not relieve the board or an individual member of the board from any responsibility imposed by law. A committee member who is not a director has the same responsibility with respect to the committee as a member who is also a director.

Section 22.219 authorizes the establishment of committees for purposes other than exercising the authority of the board of directors. Committee membership may be limited to directors.

Section 22.220 allows action by directors or committees without a meeting if consent is signed by a sufficient number of directors or committee members as would be necessary to take action at a meeting and meets other requirements for consent.

Section 22.221 mandates that a director discharge the director's duties in good faith, with ordinary care, and in a manner that the director reasonably believes to be in the best interest of the corporation, and puts the burden of proof on any person seeking to establish otherwise.

Section 22.222 allows a director of a religious corporation to rely in good faith on information presented by a religious authority, or a minister, priest, rabbi or other person whose position or duties in the corporation the justifies reliance or confidence.

Section 22.223 specifies that a director does not have the duties of a trustee of a trust with respect to the corporation or property held or administered by the corporation.

Section 22.224 authorizes the directors to delegate investment authority.

Section 22.225 prohibits a corporation from making a loan to a director and provides liability to a director or officer who participates in making the loan.

Section 22.226 imposes liability on directors under certain circumstances, including when a director votes for a distribution of assets when the corporation is insolvent, and during liquidation without payment and discharge or adequate provision for all known debts. Further, the section provides that the director is not liable if the director, in good faith and with ordinary care, relied on information under section 3.102 of the Code or considered the corporation's assets to equal at least their book value or relied on financial statements or other information concerning a person who has agreed to discharge some or all of the liabilities or obligations of the corporation.

Section 22.227 presumes that a director who is present at a meeting has assented to the action unless the director's dissent is entered in the minutes, the director files a written dissent with the secretary at the meeting or sends the dissent to the secretary immediately following the meeting.

Section 22.228 provides that a director is not liable under Section 22.226 or 22.227 if, in the exercise of ordinary care, the director acted in good faith and in reliance on the written opinion of an attorney.

Section 22.229 gives a director the right to seek contributions if held liable on a claim from those persons who accepted or received the distribution knowing the distribution to have been made in violation of Section 22.226 or 22.227.

Section 22.230 applies to contracts or transactions between a corporation and a

director, officer, or member of the corporation, as well as between an organization in which a director, officer, or member of the corporation is also a director, officer, or member of the organization or has a financial interest in the organization. The Section provides that an otherwise valid contract or transaction between a corporation and an interested party is valid if certain disclosure and approval procedures are followed. These provisions have been changed to be similar to the same provisions in Chapter 21. The presumption will be that the contract is valid if the material facts of the relationship and the contract have been disclosed and one of certain approval procedures are followed. Currently, in the TNPCA, the presumption is that the contract is not void or voidable.

Section 22.231 requires that the officers of a corporation shall consist of a president and secretary and such other officers as deemed necessary by the directors, or prescribed in the certificate of formation or bylaws. Further, the section does not allow the offices of president and secretary to be held by the same person and authorizes a properly designated committee to perform the functions of an officer.

Section 22.232 provides that the officers of a corporation shall be elected or appointed in the manner and for the terms prescribed by the certificate of formation or bylaws provided that the term of an officer may not exceed three years. In the absence of a provision to the contrary in the certificate or bylaws, the officers are elected or appointed by the board of directors or the members if management is vested in the members.

Section 22.233 relieves a church from the necessity of having officers as provided by this subchapter and allows the duties and responsibilities of the officers to be vested in the board of directors or other designated body in the manner provided in the certificate of formation or bylaws.

Section 22.234 allows an officer of a religious corporation to rely in good faith on information presented by a religious authority, or a minister, priest, rabbi or other person whose position or duties in the corporation that justifies reliance or confidence.

Section 22.235 specifies an officer is not liable to the corporation or any other person for an action in the officer's capacity unless the officer's conduct was not exercised in good faith, with ordinary care and in a manner the officer reasonably believes to be in the best interest of the corporation. The liability of the corporation is not affected.

Subchapter F. Fundamental Business Transactions

Section 22.251 requires that a plan of merger be approved by its members or directors. The procedures for approval are also specified.

Section 22.252 requires that the sale of all or substantially all of the assets be approved by its members or directors. The procedures for approval are also specified. The members may authorize the sale and set, or authorize the directors to set, the terms and conditions of the sale. Further, the directors are given the authority to abandon a sale without further action of the members. Additionally, the section allows the directors without membership approval to sell all or substantially all of the assets of the corporation when the corporation is insolvent. This Section provides a definition of sale of all or substantially all of the assets which is updated to parallel the more modern for-profit corporate provisions.

Section 22.253 sets forth the requirements for written notice of the meeting to approve a plan of merger or the sale of all or substantially all of the assets of the corporation.

Section 22.254 specifically allows the board of directors, or the members if management is vested in the members, to authorize, without membership consent, any

pledge, mortgage, deed of trust or trust indenture and any sale resulting therefrom.

Section 22.255 authorizes a corporation to convey real property when authorized by its directors or members, as appropriate.

Section 22.256 sets forth the procedures for approval of a conversion of the corporation under Chapter 10.

Section 22.257 sets forth the procedures for approval of an interest exchange by the corporation under Chapter 10.

Subchapter G. Winding Up and Termination

Section 22.301 requires the approval of a winding up and termination of a corporation, a reinstatement, a cancellation of an event requiring winding up, a revocation of a voluntary decision to wind up or a distribution plan by complying with the procedures in this Subchapter.

Section 22.302 specifies the procedures to approve a winding up and termination, a reinstatement, a cancellation, a revocation of a voluntary decision to wind up or a distribution plan.

Section 22.303 sets forth the requirements for written notice of the meeting to approve a winding up, a reinstatement, a cancellation, a revocation of a voluntary decision to wind up or a distribution plan.

Section 22.304 outlines the procedures for applying and distributing property of a corporation in the process of winding up.

Section 22.305 authorizes a corporation to approve a plan for distribution of property in accordance with this subchapter.

Section 22.306 allows a corporation that was terminated by expiration of its duration to amend its duration in the three-year period following expiration, and specifically provides that an act or contract of a corporation during this three-year period is not invalidated by the expiration of the period of duration.

Section 22.307 designates whether the directors or members are responsible for management of the winding up of the corporation's affairs.

Subchapter H. Records and Reports

Section 22.351 gives a member of a corporation the right to examine and copy the books and records of the corporation.

Section 22.352 mandates that a corporation maintain current and accurate financial records with respect to all financial transactions and prepare a report of the financial activity of the corporation for each year.

Section 22.353 requires that a corporation keep all records, books and annual reports at the registered or principal office of the corporation for at least three years and make them available for public inspection.

Section 22.354 provides that a corporation that fails to maintain the record, prepare the report, or make the record or report available is guilty of a Class B misdemeanor.

Section 22.355 sets forth the exemptions from the requirements relating to the financial records and annual reports. The exemptions include corporations that solicit funds only from members; corporations that do not receive contributions from sources

other than its own membership in excess of \$10,000 annually; certain educational institutions and related foundations; religious institutions; trade associations or professional societies; insurers; charitable organizations whose activities relate to conservation and protection of wildlife, fisheries and natural resources; and alumni associations. This Section clarifies that private institutions of higher education described in the Education Code and their foundations are exempt from the specific recordkeeping and reporting obligations in this Subchapter.

Section 22.356 provides that a corporation designed to assist a state agency shall file a report of financial activity with the Secretary of State.

Section 22.357 authorizes the Secretary of State to require a periodic report from nonprofit corporations and sets forth the information to be contained in the report.

Section 22.358 directs the Secretary of State to notify a corporation of the need to file the report.

Section 22.359 directs the corporation to file the report within 30 days of notification.

Section 22.360 authorizes the Secretary of State to forfeit the right of a corporation to conduct its affairs in Texas if it fails to timely file the report.

Section 22.361 provides that the Secretary of State shall notify the corporation of the forfeiture under 22.360.

Section 22.362 outlines the effects of the forfeiture.

Section 22.363 specifies the procedures to be followed to revive the right of the corporation to conduct affairs.

Section 22.364 gives the Secretary of State the right to terminate a domestic corporation, or revoke the registration to transact business in Texas of a foreign corporation for any corporation that fails to revive its right to conduct affairs.

Section 22.365 allows a corporation to make application for reinstatement and setting aside of a termination of any domestic corporation or revocation of registration to transact business of any corporation when the corporation files the report and for the secretary of state to reinstate the corporation or registration to transact business without judicial action.

Subchapter I. Church Benefit Boards

Section 22.401 defines a "church benefits board."

Section 22.402 permits a Texas or foreign nonprofit corporation formed for a religious purpose to provide, through a church benefits board, for the support and payment of benefits to ministers, and other functionaries of the church, of other organizations controlled or affiliated with a church, or the beneficiaries of the ministers or other functionaries.

Section 22.403 allows the board to collect contributions to aid in providing support, pensions and benefits.

Section 22.404 authorizes the board to act as a trustee and agent under a trust created by contract, will or otherwise.

Section 22.405 permits the board to provide certificates or agreements of participation to its program participants.

Section 22.406 allows the board to agree to indemnify its ministers, directors and other functionaries and their families, as well as other churches that are controlled or affiliated with the board.

Section 22.407 provides that money or other benefits provided to a participant or beneficiary are not subject to execution or other process other than a qualified domestic relations order.

Section 22.408 provides that any attempted assignment or transfer of benefits is void if the plan or program contains a prohibition against assignment or transfer without written consent and the beneficiary attempts an assignment or transfer without consent.

Section 22.409 specifically excludes church benefits boards from the provisions of the Insurance Code.

CHAPTER 23. SPECIAL-PURPOSE CORPORATIONS

Subchapter A. General Provisions

Section 23.001 makes the Code provisions applicable to special purpose corporations as well as corporations created under special statutes other than this Code. The Code is applicable only to the extent not inconsistent with the special statute and applies when a special statute contains no provisions in regard to some of the matters set forth in the Code. Additionally, the Code applies if a special statute provides that the general laws of incorporation supplement the provisions of the special statute. These general applicability provisions are derived from similar provisions in the Texas Miscellaneous Corporation Laws Act, the Texas Business Corporation Act, and the Texas Non-Profit Corporation Act.

Section 23.002 makes the filing provisions of Chapter 4 applicable to documents filed with the Secretary of State under a special statute.

Section 23.003 provides that a corporation created under a special statute is not considered to be a domestic corporation formed under this Code.

Subchapter B. Business Development Corporations

Section. 23.051 defines terms used in the chapter which are not otherwise defined in the Code or are used with a different meaning in this chapter, including corporation to mean business development corporation, financial institution, loan limit, and member.

Section 23.052 provides that 25 or more persons may form a business development corporation.

Section 23.053 indicates that a business development corporation may be formed under either Chapter 21 as a for-profit corporation or Chapter 22 as a nonprofit corporation. Further, the section outlines the purposes for which a business development corporation may be organized.

Section 23.054 enumerates those powers conferred upon business development corporation. Those powers are in addition to the powers normally granted a nonprofit or for-profit corporation.

Section 23.055 specifies that a business development corporation is a state development company as defined under federal law, and is permitted to operate on a statewide basis.

Section 23.056 sets forth the requirements for the certificate of formation.

Section 23.057 provides for the management of the corporation to be vested in a board of directions of not less than 15 or more than 21 directors.

Section 23.058 provides for the naming of the initial directors by the organizers and for election of directors otherwise. Two-thirds of the directors shall be elected by the members with the shareholders to elect the remaining members.

Section 23.059 sets forth the term of office of directors and the manner in which a vacancy in the office of a director shall be filled.

Section 23.060 authorizes the board of directors to appoint a president, treasurer, and any other agent or officer of the corporation and to fill a vacancy for an officer.

Section 23.061 outlines those persons who may acquire the shares, bonds, securities or evidences of indebtedness of the business development corporation and participate as an owner of the corporation.

Section 23.062 provides that any financial institution may become a member of the corporation and provide loans to the corporation and further sets forth the limitations on membership.

Section 23.063 specifies the procedure for withdrawal from membership in the corporation.

Section 23.064 designates the powers of the shareholders and members of the corporation.

Section 23.065 designates the voting rights of the shareholders and members.

Section 23.066 sets forth the procedures for loans from the members.

Section 23.067 outlines the restrictions and the prohibition on loans.

Section 23.068 designates the loan limits.

Section 23.069 requires the corporation to set aside earned surplus for losses and contingencies.

Section 23.070 authorizes the corporation to deposit funds in any banking institution that has been designated as a depository.

Section 23.071 requires the corporation to make annual reports of condition to the banking commissioner and the Texas department of insurance.

Subchapter C. Grand Lodges

Section 23.101 provides for the incorporation of grand lodges.

Section 23.102 makes Chapter 22 of the Code relating to nonprofit corporations applicable to lodges.

Section 23.103 allows a grand lodge incorporating under this subchapter to be created for a term of years or to have perpetual succession.

Section 23.104 provides that the incorporation of the grand body includes each of its subordinate lodges or bodies; that those subordinate bodies have all of the rights of other corporations; that the subordinate body is subject to the jurisdiction and control of the grand body; and that the warrant or charter of the subordinate body may be revoked by the grand body.

Section 23.105 authorizes a grand body to elect directors or to appoint directors from among their officers.

Section 23.106 exempts corporations formed under this subchapter from the payment of franchise taxes.

Section 23.107 provides that a grand body and a subordinate of the grand body may take action directed or provided by law for other corporations, and may make constitutions and bylaws.

Section 23.108 gives a grand body or subordinate body the authority to acquire, hold, sell or mortgage property as necessary to erect homes and schools for member's widows or orphans or elderly, disabled, or indigent members.

Section 23.109 permits a grand body to loan money for charitable purposes, to take liens on real property, and purchase real property secured by a lien.

Section 23.110 provides that when a subordinate body terminates, all property and rights pass to the grand body, and that the liability for debt is limited to the actual cash value of the subordinate body's effects.

TITLE 3. LIMITED LIABILITY COMPANIES

CHAPTER 101. LIMITED LIABILITY COMPANIES

Chapter 101 contains provisions relating to limited liability companies. Unless otherwise noted, the provisions of this chapter are nonsubstantive revisions of comparable provisions found in the TLLCA. The provisions utilize the new terminology of the Code.

Subchapter A. General Provisions

Subchapter A contains provisions generally applicable to limited liability companies under this Chapter.

Section 101.001 provides definitions specifically applicable to this Chapter. The term "company agreement" is new and replaces the term "regulations" under existing law. The definition of "company agreement" is based upon Section 18-101(7) of the Delaware Limited Liability Company Act but is consistent with existing Texas law regarding regulations. The definition of "limited liability company" or "company" is based upon Art. 1.02A(3) of the TLLCA. The definition of "foreign limited liability company" is based upon, but narrower than, Art. 1.02A(9) of the TLLCA. The company agreement may contain any provisions not inconsistent with law or the certificate of formation. Foreign entities of a type that have no counterpart under existing Texas law (for example, business trusts) can register to do business in Texas as a foreign limited liability company. The Code eliminates this provision but requires under Section 9.001 that any foreign entity affording limited liability to its owners or members must register with the Secretary of State to transact business in Texas.

Subchapter B. Formation and Governing Documents

Subchapter B contains provisions relating to the governing documents (certificate of formation and company agreement [see discussion of Section 101.052, below]) of limited liability companies governed by this Chapter, including provisions stating the order of precedence of application of provisions of this code and the governing documents of the limited liability company.

Section 101.051 allows any provision that may be included in the company agreement of a limited liability company to also be included in the certificate of formation, and that any reference in this title to the company agreement includes any such provision.

Section 101.052 provides that, except as provided by the code, the company agreement of a limited liability company governs the relations among the members, managers and officers of the company, assignees of membership interests, and the company itself, as well as the internal affairs of the company. To the extent that the company agreement does not otherwise provide, the provisions of this title and the provisions of Title 1 applicable to a limited liability company govern the internal affairs, and those provisions may, except as provided in Section 101.054, be waived or modified by the company agreement. The company agreement may contain any provisions not inconsistent with law or the certificate of formation.

This section represents a change from existing law in two respects: first, the name of the governing document for a limited liability company other than its certificate of formation (articles of organization under prior law) has been changed to "company agreement" rather than "regulations," the term used under existing law. This change was intended to emphasize the underlying contractual nature of this governing document for a limited liability company and to make Texas law more consistent with laws governing limited liability companies in other states. This first change is not a substantive change, but, like the new Code terminology change from "articles of organization" to "certificate of formation," is a significant change in terminology.

Second, this Section and Section 101.054 represent a significant change in the structure of the limited liability company statute. The prior statute contained numerous provisions that were 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 new law takes the approach that, except as provided in Section 101.054, *every* provision of the code governing limited liability companies may be waived or modified by the company agreement of a limited liability company, and that the terms of the company agreement will, with that qualification, take precedence over the terms of the Code. In the absence of a governing provision in the company agreement, the provisions of the code will govern as a "default" provision. This order of precedence is also reflected by Section 101.252.

Because of the reversal of the prior assumption that each provision of the limited liability company statute was mandatory (unless expressly qualified) to the new assumption in Sections 101.052 and 101.054 that most provisions of the code governing limited liability companies may be waived or modified, a number of the provisions of this title are now stated in such a way that the new provision appears to be the converse of the corresponding provision under the TLLCA; however, because the actual effect of the operation of this Section, Section 101.054 and the provisions in question is the same as existing law in most cases, these reversals in the *form* of provisions are not noted separately in this bill analysis unless there is actually a substantive change from existing law as a result of the reversal. One example of a change in the way a provision is stated without a substantive change in the law is found in the rewording of Art. 5.05 of the existing law to Section 101.107 of this Chapter.

Section 101.052 is similar in structure to TRPA Sections 1.03(a), 4.01(i), and Uniform Limited Liability Company Act Sections 103(a), 404(c)(1).

Section 101.053 provides that the company agreement of a limited liability company may be amended only if each member of the company consents to the agreement. As with most other provisions of Chapter 101, this rule may be revised by a provision in the company agreement.

Section 101.054 lists the provisions of the Code that may not be waived or modified by the company agreement of a limited liability company, or may be waived or modified only in certain circumstances. This section represents a significant structural change to existing law, as stated in the discussion of Section 101.052, above. This section is structured similar to TRPA Section 1.03(b) and Uniform Limited Liability Company Act Section 103(b).

Subchapter C. Membership

Subchapter C contains provisions relating to members of and membership interests in limited liability companies.

Section 101.101 provides that a limited liability company may have one or more members and, except as provided by this Section, must have at least one member. This Section clarifies that the limited liability company need not have a member for a reasonable time (i) between the formation date of a manager-managed limited liability company and the admission of its first member, and (ii) between the date of termination of the last remaining member and the date of an agreement to continue the company. This Section is in part similar to the Uniform Limited Liability Company Act Section 202(a).

Section 101.102 provides that a person may be a member of a limited liability company unless the person lacks capacity apart from the code. In addition, Subsection (b) is a new provision stating that a person is not required to make a contribution, otherwise pay cash or contribute property, to the limited liability company, or assume an obligation to do so, as a condition to becoming a member or acquiring a membership interest. With respect to subsection (b), this Section is similar to Delaware Limited

Liability Company Act Section 18-301(d).

Section 101.103 states the effective date that a person becomes a member of a limited liability company upon acquiring a membership interest. A person who is assigned or acquires directly a membership interest becomes a member upon approval of all of the company's members.

Section 101.104 provides for the establishment of classes or groups of members or membership interests by the company agreement of a limited liability company.

Section 101.105 permits the issuance of membership interests after the formation of the limited liability company, with the approval of all of the members of the company, and, if necessary, the establishment of a new class or group of members or membership interests under Section 101.104. This section represents a change from Art. 2.23D(2) of the TLLCA, which provides that additional membership interests may be issued with the approval of a majority of the members. The rule in Section 101.105 makes the default rule regarding issuance of additional membership interests and creation of new classes of interests consistent with the default rules under the TLLCA and the code requiring consent of all members to admit a new member and consent of all members to amend the regulations or company agreement.

Section 101.106 provides that a membership interest in a limited liability company is personal property, and that a member of a limited liability company or assignee of a membership interest does not have an interest in any specific property of the company.

Section 101.107 provides that a member of a limited liability company may not withdraw or be expelled from the company.

Section 101.108 provides that a membership interest in a limited liability company may be wholly or partly assigned. It states that an assignment of a membership interest is not an event requiring the winding up of the company, and does not entitle the assignee to participate in the management of the affairs of the company, become a member, or exercise any rights of a member.

Section 101.109 states the rights and duties of an assignee of a membership interest in a limited liability company but who has not become a member of the limited liability company. Subsection (b) provides that an assignee of a membership interest is entitled to become a member upon approval of all of the company's members.

Section 101.110 states the rights and duties of an assignee of a membership interest in a limited liability company following the assignee's admission as a member of the company.

Section 101.111 states the rights and duties of an assignor of a membership interest in a limited liability company.

Section 101.112 provides that, upon application by a judgment creditor of a member or any other owner of a membership interest in a limited liability company, a court may charge the membership interest of the member or owner with payment of the unsatisfied amount of the judgment; the judgment creditor then has only the rights of an assignee of the membership interest, although this section does not deprive the member or owner of the benefit of any exemption laws applicable to the membership interest.

Section 101.113 provides that a member of a limited liability company may be named as a party in an action brought by or against the company only if the action is brought to enforce the member's right against or liability to the company.

Section 101.114 provides that a member or manager is not liable for a debt, obligation or liability of a limited liability company except as and to the extent the

company agreement specifically provides otherwise.

Subchapter D. Contributions

Subchapter D contains provisions relating to contributions of members to limited liability companies.

Section 101.151 provides that a promise to make a contribution or otherwise pay cash or transfer property to a limited liability company is enforceable only if it is in writing and signed by the person making the promise.

Section 101.152 provides that the enforceability of a member's promise to make a contribution or otherwise pay cash or transfer property to a limited liability company is unaffected by the death, disability or other change in circumstances of the member.

Section 101.153 states the consequences for the failure of a member of a limited liability company to perform an enforceable promise to make a contribution or otherwise pay cash or transfer property to a limited liability company.

Section 101.154 provides that an obligation of a member of a limited liability company to make a contribution or otherwise pay cash or transfer property to a limited liability company, or to return cash or property improperly distributed to the member, may only be released or settled by the consent of each member of the company.

Section 101.155 provides that a creditor of a limited liability company that extends credit or acts in reasonable reliance on an enforceable promise of a member of the company that is released under Section 101.154 may enforce the original obligation if it is stated in a document signed by the member and not amended or canceled to evidence the release or settlement of the obligation.

Section 101.156 states the requirements for enforcement by a creditor under Section 101.155 of a conditional obligation of a member, including a contribution payable on a discretionary call of the limited liability company before the call occurs.

Subchapter E. Allocations and Distributions

Subchapter E contains provisions relating to allocations to members of limited liability companies of profits and losses of the company, and to distributions to members from limited liability companies.

Section 101.201 provides that the profits and losses of a limited liability company are allocated to the members of the company in accordance with their interests in the company on the date of the allocation, as stated in the company's records.

Section 101.202 provides that a member of a limited liability company is only entitled to receive or demand distributions from the company in the form of cash, regardless of the form of the member's contribution to the company.

Section 101.203 provides that distributions of cash and other assets of a limited liability company shall be made to the members of the company on the basis of the agreed value of each member's contribution to the company as stated in the company's records. Because Section 101.202 provides that members are only entitled to receive or demand distributions in the form of cash, that section would need to be modified by the company agreement for the limited liability company to distribute other assets to the members.

Section 101.204 provides that until the company is wound up, no member of a limited liability company is entitled to receive or demand a distribution from the company until the company's governing authority declares a distribution to each of the members or to a class or group that includes the member in question. This is a

substantive change to existing law, which leaves the determination and timing of such distributions to the company's regulations.

Section 101.205 provides that a member of a limited liability company who validly exercises a right to withdraw from the company that is granted in the company agreement is entitled to receive, within a reasonable time after withdrawal, the fair value of the member's interest in the company, determined as of the date of withdrawal. A company agreement that granted such a right to withdraw would modify the requirement of Section 101.107 that a member may not withdraw or be expelled from the company.

Section 101.206 provides that a limited liability company may not make a distribution to a member if, immediately after the distribution, the company's total liabilities (subject to certain exceptions) exceed the fair value of the company's total assets. A member who receives such a distribution is required to return it to the company if the member had knowledge of the violation.

Section 101.207 provides that, with certain exceptions, a member of a limited liability company who is entitled to receive a distribution from the company has the same status and is entitled to the same remedies as a creditor of the company.

Subchapter F. Management

Subchapter F contains provisions relating to the management of limited liability companies, whether by managers or members of the company.

Section 101.251 provides that the governing authority of a limited liability company consists of the managers of the company, if the certificate of formation states that the company will have managers, or the members of the company, if the certificate of formation states that the company will not have managers. This Section clarifies that there is no default rule as to the form of management (e.g., member-managed or manager-managed) because the form of management must be addressed in the certificate of formation.

Section 101.252 provides that the governing authority of the limited liability company will manage the business and affairs of the company as provided by the company agreement, or, to the extent that the company agreement does not so provide, as provided by this title and the provisions of Title 1 applicable to limited liability companies. This Section clarifies that a limited liability company, whether member-managed or manager-managed, is governed first by its company agreement and second by the Code to the extent the company agreement does not provide for management of the company.

Section 101.253 provides that the governing authority of a limited liability company may designate one or more committees and that such a committee may exercise the authority of the governing authority as provided in the resolution designating the committee, but that the designation of a committee under this section does not relieve the governing authority of any responsibility imposed by law. This is a substantive change from existing law, which allows the designation of committees only if the regulations so provided. This Section omits language requiring an express authority in resolutions, the certificate of formation or the company agreement for a committee to authorize a distribution or the issuance of membership interests. This Section specifies that the committee's authority is provided by the resolution designating the committee.

Section 101.254 provides that, with certain exceptions, each governing person of a limited liability company and each officer and agent of the limited liability company vested with actual or apparent authority is an agent of the company for the purpose of carrying out the company's business. An act committed by such an agent of the company apparently for the purpose of carrying out the ordinary course of the company's business binds the company unless the agent does not have actual authority to act for the company and the person dealing with the agent has knowledge of such lack of authority. This

Section makes explicit what was only implicit in the TLLCA, namely that acts committed by such an agent of the company that are not apparently for the purpose of carrying out the ordinary course of the company's business do not bind the company unless authorized in accordance with this title.

Section 101.255 states the conditions under which an otherwise valid contract or transaction between a limited liability company and certain persons affiliated with the limited liability company is not rendered invalid.

Subchapter G. Managers

Subchapter G contains provisions relating to managers of limited liability companies, and applies only to limited liability companies that have one or more managers.

Section 101.301 provides that this Subchapter applies only to a limited liability company that has one or more managers. This Section makes explicit that the rules applicable to managers do not apply to limited liability companies without managers, which is only implied in the TLLCA.

Section 101.302 provides that the managers of a limited liability company consist of one or more persons, the number being determined by the number of initial managers listed in the company's certificate of formation unless increased or decreased by amendment to, or as provided by, the company agreement for the company. Managers are not required to be residents of this state or members of the limited liability company.

Section 101.303 states the term for which the manager of a limited liability company serves.

Section 101.304 provides that, subject to Section 101.306(a), a manager of a limited liability company may be removed, with or without cause, at a meeting of the company's members called for that purpose. Section 101.304 makes clear the right of the members to remove a manager even if the company agreement is silent regarding removal. TLLCA Art. 2.13 states that "[t]he regulations may provide that at any meeting of the members called expressly for that purpose any managers may be removed, with or without cause, as provided therein." Thus the right of members to remove managers absent provisions in the regulations is unclear under existing law.

Section 101.305 states the procedure for filling the vacancy in the position of a manager of a limited liability company and the term of a person elected to fill such a vacancy.

Section 101.306 states the requirements for removal of a manager elected by a class or group of members of the limited liability company by authority of the company agreement, and states the requirements for filling a vacancy in the position of such a manager.

Section 101.307 provides that methods of classifying managers of a limited liability company, including providing for staggered terms of office or terms that are not uniform, may be established in the company agreement of a limited liability company.

Subchapter H. Meetings and Voting

Subchapter H contains provisions relating to meetings of the members, governing authority, and committees of the governing authority of a limited liability company, and relating to voting by the members, governing authority, and committees of the governing authority of a limited liability company.

Section 101.351 provides that this Subchapter applies to a meeting of and voting by the governing authority of a limited liability company, the members of the limited

liability company if they do not constitute the governing authority of the limited liability company, and committees of the governing authority of a limited liability company.

Section 101.352 states the requirements for notice of regular and special meetings of the members, governing authority, and committees of the governing authority of a limited liability company. This is a substantive change to existing law in that existing law left notice requirements solely to the provisions of the regulations.

Section 101.353 provides that a majority of all of the governing persons, members, or committee members of a limited liability company constitutes a quorum for the purpose of transacting business at a meeting.

Section 101.354 provides that each governing person, member, or committee member of a limited liability company has an equal vote at a meeting of the governing authority, members, or committee, respectively.

Section 101.355 provides that, with certain exceptions, the affirmative vote of the majority of the governing persons, members, or committee members of a limited liability company present at a meeting at which a quorum is present constitutes an act of the governing authority, members, or committee, respectively.

Section 101.356 provides that, except as otherwise provided in this Section and other sections in this title, an action of a limited liability company may be approved by the company's governing authority as provided in Section 101.355. Specific approval requirements are given for actions apparently not for carrying out the ordinary course of business of the company, for fundamental business transactions, for actions that would make it impossible for a limited liability company to carry out the ordinary course of its business, and for amendment of the certificate of formation of the limited liability company; requirements that an action be approved by the members of the limited liability company, however, do not apply during the period specified by Section 101.101(b). Certain transactions listed in TLLCA Art. 2.23D have not been included in Section 101.356 in order to correct inconsistencies in current provisions of the TLLCA regarding the default vote required for certain actions (issuance of additional membership interests, change from member-management to manager-management or vice versa and acts in contravention of regulations).

Section 101.357 provides that a member of a limited liability company may vote in person or by written proxy, and, in a substantive change to TLLCA, Subsection (b) provides that a manager or committee member of a limited liability company may, if authorized by the company agreement, vote in person or by written proxy.

Section 101.358 provides that, notwithstanding Sections 6.201 and 6.202, an action required or authorized to be taken at an annual or special meeting of the members, governing persons, or committee members of a limited liability company may be taken without holding a meeting or providing notice or taking a vote if a written consent or consents stating the action to be taken is signed by the number of members, governing persons, or committee members necessary to have taken the action at a meeting at which each member, governing person, or committee member entitled to vote on the action is present and votes.

Subchapter I. Modification of Duties; Indemnification

Subchapter I contains provisions relating to indemnification of persons by limited liability companies and modification of fiduciary and other duties of persons relating to limited liability companies and to members, managers, and officers of the companies and assignees of membership interests.

Section 101.401 provides that the company agreement of a limited liability company may expand or restrict any duties (including fiduciary duties) and related liabilities that a member, manager, officer or other person has to the company or to a

member or manager of the company.

Section 101.402 provides that a limited liability company may indemnify a person, advance or reimburse expenses incurred by a person, and purchase insurance or make other arrangements to indemnify a person, including a member, manager, or officer of a limited liability company or an assignee of a membership interest in the company.

Subchapter J. Derivative Proceedings

Subchapter J contains provisions relating to derivative proceedings by members of limited liability companies.

Section 101.451 contains definitions specifically applicable to this Subchapter.

Section 101.452 states the requirements for a member to have standing to bring a derivative proceeding under this Subchapter.

Section 101.453 provides that, with certain exceptions, a written demand must have been filed with the limited liability company and a 90-day waiting period must have expired prior to a member filing a derivative proceeding under this Subchapter.

Section 101.454 provides that a determination of how to proceed on allegations made in a demand or petition relating to a derivative proceeding must be made under specified conditions by affirmative vote of (1) the majority of independent and disinterested governing persons present at a meeting of only disinterested governing persons, (2) the majority of a committee of two or more independent and disinterested persons appointed by a majority of independent and disinterested governing persons present at a meeting of the governing authority, or (3) the majority of a panel of one or more independent and disinterested persons appointed by a court on motion of a limited liability company. This section also provides the standards for court appointment of such a panel and limits the liability of persons appointed to such a panel.

Section 101.455 provides that if a limited liability company that is the subject of a derivative proceeding commences an inquiry into the allegations made in the demand or petition and the persons described in Section 101.454 are conducting an active review of the allegations in good faith, the court shall stay the derivative proceeding until the review is complete and the persons have determined what further action, if any, should be taken. The section further provides for review of the stay for continued necessity every 60 days.

Section 101.456 states limits on discovery by a member after the filing of a derivative proceeding under this Subchapter if the limited liability company proposes to dismiss the derivative proceeding under Section 101.458.

Section 101.457 provides that a written demand filed with the limited liability company under Section 101.453 tolls the statute of limitations on the underlying claim until the earlier of the 91st day after the date of the demand or the 31st day after the date that the limited liability company advises the member that the demand has been rejected or the review completed.

Section 101.458 requires a court to dismiss a derivative proceeding on a motion by the limited liability company if the persons described in Section 101.454 determine in good faith, after conducting a reasonable inquiry and based on factors they consider appropriate under the circumstances, that continuation of the derivative proceeding is not in the best interests of the limited liability company. The Section also states the burden of proof for such a motion.

Section 101.459 provides that if a derivative proceeding is instituted after a demand is rejected, the petition must allege with particularity facts that establish that the rejection was not made in accordance with the requirements of Sections 101.454 and

101.458.

Section 101.460 provides that a derivative proceeding may not be discontinued or settled without court approval and also that the court direct that notice be given to members whose interests the court determines may be substantially affected by a proposed discontinuance or settlement.

Section 101.461 states the requirements for a court to order the payment by another party of the reasonable expenses incurred by a party in a derivative proceeding.

Section 101.462 states the extent of application of this Subchapter and of the laws of its jurisdiction of organization to derivative proceedings brought in the right of a foreign limited liability company.

Section 101.463 provides that in the case of a "closely held limited liability company" having fewer than 35 members and no membership interests listed on a national securities exchange or regularly quoted in an over-the-counter market, the provisions of Sections 101.452 through 101.459 do not apply; except that, if justice requires, a derivative proceeding brought by a member may be treated by a court as a direct action brought by the member for the member's own benefit and any recovery by the member may be paid directly to the plaintiff or to the limited liability company if necessary to protect the interests of creditors or other members of the limited liability company.

Subchapter K. Supplemental Recordkeeping Requirements

Subchapter K contains provisions stating the recordkeeping requirements for limited liability companies in addition to the requirements of Section 3.151, and providing certain inspection rights of members with respect to the records kept by the limited liability company.

Section 101.501 states a list of the books and records that a limited liability company is required to keep at its principal office (and make available upon certain requests) in addition to the books and records required by Section 3.151. The company is not required to keep information listed in Subsection (a)(7) of this Section at its office if the information is stated in the company agreement. The Section further requires that a limited liability company keep at its registered office in this state and make available on reasonable request the street address at which the records required by this Section and Section 3.151 are maintained.

Section 101.502 provides that the limited liability company must provide to each member or assignee of a membership interest, on written request and for a proper purpose, access to records required under Sections 3.151 and 101.501, and certain other information about the business, affairs and financial condition of the company. Copies of the company's certificate of formation and amendments, company agreement and amendments (if in writing), and tax returns must be provided for free.

Subchapter L. Supplemental Winding Up and Termination Provisions

Subchapter L contains provisions that apply to the winding up of limited liability companies in addition to the provisions of Chapter 11 of this code.

Section 101.551 provides that after an event requiring the winding up of a limited liability company occurs, unless revoked under Section 11.151 or canceled under Section 11.152, the winding up of the company must be carried out by the company's governing authority or one or more persons designated by the governing authority, the members or the governing documents; a person designated by the court under Sections 11.405, 11.409 or 11.410; or, if the winding up is caused by the termination of the membership of the last member of the company, the legal representative or successor of the last member or one or more persons designated by the legal representative or successor.

Section 101.552 provides that the requirements for approval of the voluntary winding up of a limited liability company, or the revocation of that winding up, or the cancellation of an event requiring the winding up, or a reinstatement of a terminated limited liability company are a majority vote of the limited liability company's members or, if the company has no members, a majority vote of all of the company managers. This section makes a substantive change in existing law, which requires the written consent of all members to revoke voluntary dissolution (TLLCA Art. 6.06A), and the vote of all members (or a different voting requirement stated in the company regulations) to continue the business of the company following certain events of dissolution (TLLCA Art. 6.01.B). There was no specific provision in the TLLCA governing reinstatement of a terminated limited liability company. The change made by this Code results in the standardization of the voting requirement for these actions to a majority of the members, and adds the additional alternative of the approval of the actions by the managers of the limited liability company if it has no members.

TITLE 4. PARTNERSHIPS

CHAPTER 151. GENERAL PROVISIONS

Chapter 151 contains provisions generally applicable to general partnerships and limited partnerships under this Title.

Section 151.001 provides definitions specifically applicable to this Title, including the terms "capital account," "distribution," "foreign limited partnership," "majority-in-interest," and "partnership agreement." The definition of "foreign limited partnership" is narrower for purposes of Title 4 than for purposes of Title 1. This Section defines that term to include only limited partnerships formed under laws of another state while the Title 1 definition allows non-U.S. limited partnerships to constitute a part of that term. As a result, a non-U.S. limited partnership may register to do business in this state under Chapter 9 as a foreign limited partnership.

Section 151.002 provides when a person has knowledge of a fact for purposes of this Title.

Section 151.003 provides when a person has notice of a fact for purposes of this Title.

CHAPTER 152. GENERAL PARTNERSHIPS

Subchapter A. General Provisions

Section 152.001 contains definitions applicable to general partnerships under this Chapter, including the defined terms "event of withdrawal," "event requiring a winding up," "foreign limited liability partnership," and "withdrawn partner." The defined term "other partnership provisions" is new and is defined to mean the provisions of Chapters 151 and 154 and Title 1 to the extent applicable to partnerships.

Section 152.002(a) sets forth the following principles: first, that the partnership agreement governs the relations of the partners and between the partners and the partnership; and second, this Chapter and the other partnership provisions govern the relationships of partners and between the partners and the partnership to the extent that the partnership agreement does not otherwise provide. Section 152.002(b) lists the provisions of the Code that may not be waived or modified by the partnership agreement or that may be waived or modified only in certain circumstances. The list of provisions has been revised from existing law to reflect the move of certain provisions of TRPA to Title 1. Section 152.002(b)(9) provides that, with certain exceptions, a partnership agreement or the partners may not waive or modify specific Chapters in Title 1.

Sections 152.002(c) and (d) are new and provide certain exceptions. Section 152.002(c) provides that a partnership agreement or the partners may waive or modify a statutory provision listed in Section 152.002(b)(9) if such statutory provision expressly permits a waiver or modification in the partnership's governing documents. Section 152.002(d) provides that a partnership agreement or the partners may modify a statutory provision listed in Section 152.002(b)(9) to the extent that such statutory provision specifies the persons or group of persons which are entitled to approve an action of the partnership or the vote or other method by which such action is to be approved.

Section 152.003 provides that this Chapter and the other partnership provisions are supplemented by the principles of law and equity.

Section 152.004 eliminates the application of the rule that statutes in derogation of the common law are to be strictly construed.

Section 152.005 provides that the rate of interest that applies in the absence of an agreement among the partners is that specified in Section 302.002 of the Texas Finance Code.

Subchapter B. Nature and Creation of Partnership

Section 152.051(a) provides that a partnership is created by the association of two or more persons to carry on a business for profit as owners. Section 152.051(b) provides that an association or organization created under statutes, other than this Title and the provisions of Title 1 to the extent applicable to partnerships and limited partnerships, is not a partnership. Section 152.051(c) is new and clarifies that an "association," as used in Section 152.051(b), does not have the same meaning as the defined term "association" contained in Chapter 1. Subsection (d) provides that Chapter 152 governs limited partnerships only to the extent provided by Sections 153.003 and 153.152 and Subchapter H of Chapter 153.

Section 152.052 sets forth various factors for determining whether a partnership has been created.

Section 152.053(a) provides that a person may be a partner unless the person lacks capacity apart from this Chapter. Section 152.053(b) provides that, with certain exceptions, a person who is not a partner in a partnership is not liable to third persons as a partner.

Section 152.054 provides that a representation or conduct indicating that a person is a partner with another person or that a person is a partner in an existing partnership do not, in themselves, create a partnership or make the person a partner in a partnership.

Section 152.055 permits doctors of medicine, osteopathy and podiatry to jointly own professional partnerships. Subsection (b) prohibits any professional from exercising control over another professional's clinical authority if beyond the scope of that professional's license.

Section 152.056 specifies that a partnership is an entity distinct from its partners.

Subchapter C. Partnership Property

Section 152.101 states that partnership property is not property of the partners.

Section 152.102 sets forth the rules for determining when property is acquired by a partnership and, therefore, becomes partnership property.

Subchapter D. Relationship Between Partners and Between Partners and Partnerships

This subchapter establishes many of the rules that govern the relations among partners when the partners fail to address the issues in a partnership agreement. Subject to Section 152.002, however, these provisions are subject to contrary agreement of the partners.

Section 152.201 provides that no person may become a partner without the consent of all of the other partners.

Subsections (a) and (b) of Section 152.202 provide that each partner is credited with the partner's contributions and share of the partnership profits and charged with distributions to the partner and the partner's share of partnership losses. This Section does not affirmatively require that a partnership maintain records of partners' capital accounts, but instead provides that, absent an agreement among the partners to the contrary, the financial rights and obligations of the partners among themselves will be determined in this manner. Section 152.202(c) provides that each partner is credited with an equal share of the partnership's profits and is charged with the share of the losses in proportion to the partner's share of the profits.

Section 152.203 lists certain rights and duties of a partner, all of which are subject to the contrary agreement of the partners.

Section 152.204 provides that a partner owes the duties of loyalty and care and has an obligation to discharge all duties in good faith and in a manner reasonably believed by the partner to be in the best interest of the partnership.

Section 152.205 delineates three specific elements of a partner's duty of loyalty.

Section 152.206 defines a partner's duty of care.

Section 152.207 provides that the prescribed standards of conduct (*i.e.*, the duties of loyalty and care and the obligation of good faith) apply equally to a person engaged in winding up the partnership business as the personal or legal representative of the last surviving partner, as if the person were a partner.

Section 152.208 provides that, absent an agreement of the partners to the contrary, a partnership agreement may be amended only with the consent of all partners.

Section 152.209 provides that matters arising in the ordinary course of the partnership's business may be decided by a majority in interest of the partners, whereas an act outside the ordinary course of business may be undertaken only with the consent

of all partners.

Section 152.210 provides that a partner is liable to the partnership for any breach of the partnership agreement or for the violation of any duty to the partnership or the other partners that causes harm to the partnership or the other partners.

Section 152.211 pertains to remedies for enforcement in the event a partner breaches the partnership agreement or violates a duty to the partnership. Subsection (a) provides that the partnership itself may maintain an action. Subsection (b) states that a partner may bring a direct suit against the partnership or another partner for a cause of action arising out of the conduct of the partnership business. Such action may include seeking a formal accounting, but a formal accounting is not a prerequisite to pursuing the claim. Subsection (c) provides that causes of action of the type covered by Section 152.211 accrue, and are subject to time limitations, as provided by general law. Subsection (d) provides that a cause of action barred by the applicable statute of limitations cannot be revived by the right to a final accounting.

Section 152.212 sets forth certain provisions with respect to a partnership's books and records, if any, and the rights of access thereto.

Section 152.213 sets forth the circumstances upon which a partner and the partnership are required to furnish information regarding the partnership to a partner, the legal representative of a deceased partner or a partner who has a legal disability, or an assignee.

Section 152.214 provides that a partner can still bind the partnership under the agency principles set forth in Sections 152.301 and 152.302, even though the partner's authority has been limited under the various sections in Subchapter D enumerated in Section 152.214 without the knowledge of the third party with whom the partner was dealing.

Subchapter E. Relationship Between Partners and Other Persons

Section 152.301 provides that each partner is an agent of the partnership for the purpose of its business.

Section 152.302 provides that unless a partner lacks authority to act for the partnership and the person with whom the partner is dealing knows that the partner does not have authority, an act of a partner binds the partnership if the act is apparently for carrying on in the ordinary course of partnership business or business of the kind carried on by the partnership. This Section further provides that an act not apparently for carrying on in the usual way the partnership business or business of the same kind does not bind the partnership unless the action was actually authorized by the other partners. This Section also contains a special rule for real estate conveyances to the effect that an otherwise unauthorized conveyance nonetheless is binding if the grantee subsequently conveys to a purchaser for value without knowledge of the lack of authority.

Section 152.303 (a) provides that a partnership is liable for the wrongful actions or omissions of its partners who are acting in the ordinary course of business of the partnership or with the authority of the partnership. Section 152.303(b) provides that a partnership is liable for the loss of money or property of a person who is not a partner that is received in the course of its business.

Section 152.304(a) continues the rule under TRPA that all partners are liable jointly and severally for all debts and obligations of the partnership unless the claimant agrees otherwise or other law provides a limitation on liability. This Section also recognizes that the foregoing rule is subject to the provisions in Chapter 152 regarding limited liability partnerships. Section 152.304(b) pertains to the liability of an incoming partner and provides that a new partner has no personal liability for obligations of the partnership that arose before the partner's admission to the partnership or relate to actions

taken or commitments entered into before the partner's admission to the partnership.

Section 152.305 provides that an action may be brought against the partnership and any or all of the partners in the same action or in separate actions.

Section 152.306(a) provides that a judgment against the partnership is not, standing alone, a judgment against any of the partners, but that a judgment may be entered against any partner who has been served with process in the same suit. Section 152.306(b) provides that a claimant asserting its claim against the partnership may satisfy a claim against the individual assets of a partner only if a judgment is also obtained against the partner based upon the same claim and the judgment obtained against the partnership remains unsatisfied for ninety (90) days after entry. Section 152.306(c) sets forth certain instances in which, notwithstanding Section 152.306(b), a creditor may proceed directly against a partner without first seeking satisfaction from partnership property. Section 152.306(d) states that Section 152.306 does not limit the effect of the statutory provisions pertaining to a limited liability partnership.

Section 152.307 provide that the rights of a person extending credit in reliance on a representation described by Section 152.054 (*i.e.*, a false representation indicating that a partnership exists or that a person is a partner in an existing partnership) and the rights and duties of persons held liable for such a representation are determined by the law other than this Chapter and the other partnership provisions, including the law of estoppel, agency, negligence, fraud or unjust enrichment.

Subchapter F. Transfer of Partnership Interests

Section 152.401 provides that a transfer of a partner's partnership interest is permissible, in whole or in part.

Section 152.402 provides that a transfer of a partner's partnership interest: (i) is not an event of withdrawal; (ii) does not by itself cause a winding up of the partnership business; and (iii) does not, as against the partners or the partnership, entitle the transferee during the continuance of the partnership, to participate in the management or conduct of the partnership business.

Section 152.403 provides that after a transfer, the transferor continues to have the rights and duties of a partner other than the interest transferred.

Section 152.404(a) provides that a transferee of a partner's partnership interest is entitled to receive, to the extent transferred, distributions to which the transferor would otherwise be entitled. Section 152.404(b) provides that the transferee is entitled to receive, to the extent transferred, the net amount otherwise distributable to the transferor upon a winding up of the partnership business. Section 152.404(c) provides that unless a transferee becomes a partner, a transferee does not have liability as a partner solely as a result of the transfer. Section 152.404(d) provides that for any proper purpose, a transferee may require reasonable information or an account of partnership transactions and make reasonable inspection of the partnership books. In addition, the Section provides that in a winding up, a transferee may require an accounting only from the date of the latest account agreed to by all of the partners. Section 152.404(e) provides that a partnership has no duty to give effect to a transferee's rights until the partnership receives notice of the transfer.

Section 152.405 provides that a partnership has no duty to give effect to a transfer prohibited by the partnership agreement.

Section 152.406 pertains to the effect of death or divorce on a partnership interest and provides that: (i) on the divorce of a partner, the partner's spouse is to be regarded as a transferee of the partnership interest from a partner; (ii) on the death of a partner, the partner's surviving spouse and the partner's beneficiaries are regarded as transferee's of the partnership interest from the partner; (iii) on the death of a partner's spouse, the

spouse's beneficiaries are regarded as transferees of the partnership interest from the partner; (iv) the death, bankruptcy and other occurrences with respect to a partner's spouse are not events of withdrawal; and (v) this Chapter does not impair buy-sell or other agreements for the purpose or sale of a partnership interest at the death of the owner of the partnership interest or at any other time.

Subchapter G. Withdrawal of Partner

Section 152.501 provides that a partner ceases to be a partner on the occurrence of an event of withdrawal and enumerates the circumstances with respect to which an event of withdrawal of a partner is deemed to occur. This Section expands the provision permitting expulsion of a corporate or partnership partner under certain circumstances to other types of entities that are partners.

Section 152.502 states that, upon withdrawal of a partner, the partnership continues. The event of withdrawal nonetheless has the effects on the relationships among the withdrawn partner, the partnership and the continuing partners have provided in Sections 152.503 through 152.506 and Subchapter H.

Section 152.503(a) provides that a partner has the power to withdraw at any time before the occurrence of an event requiring a winding up. Section 152.503(b) sets forth the circumstances in which a partner's withdrawal is wrongful. Section 152.503 (c) provides that a wrongfully withdrawn partner is liable to the partnership and to the other partners for damages caused by the withdrawal, in addition to any other liability of the partner to the partnership or to the other partners.

Section 152.504 pertains to a withdrawn partner's power to bind the partnership and the partner's liability to the partnership for any loss caused by the exercise of this power. Subsection (a) provides that the action of a withdrawn partner within one year after the person's withdrawal binds the partnership if the transaction is one that would bind the partnership before the person's withdrawal and the other party to the transaction (i) does not have notice of the person's withdrawal as a partner, (ii) had done business with the partnership within one year preceding the withdrawal, and (iii) reasonably believed that the withdrawn partner was a partner at the time of the transaction. Subsection (b) provides that a withdrawn partner is liable to the partnership for any loss arising from an obligation incurred by the withdrawn partner after withdrawal for which the partnership is liable under Subsection (a).

Section 152.505 contains provisions relating to the effect of the withdrawal on a partner's existing liability for partnership obligations.

Section 152.506 provides that a withdrawn partner remains liable as a partner to a third party in transactions entered into by the partnership within two years after the partner's withdrawal, if the other party does not have notice of the partner's withdrawal and reasonably believes when entering into the transaction that the withdrawn partner is still a partner.

Subchapter H. Redemption of Withdrawing Partner or Transferee's Interest

Subchapter H contains provisions relating to the redemption of a withdrawing partner or transferee's interest.

Section 152.601 sets forth the circumstances upon which the interest of the withdrawn partner is automatically redeemed by the partnership as of the date of withdrawal.

Section 152.602 specifies the redemption price of a withdrawn partner's partnership interest.

Section 152.603 specifies the obligation of a withdrawn partner to make

contributions to the partnership. Specifically a withdrawn partner is obligated to make a contribution to eliminate any deficit in the partner's capital account under Section 152.708 and to satisfy partnership obligations under Section 152.709. The amount of such contributions is calculated as if an event requiring a winding up occurred at the time of withdrawal.

Section 152.604 provides that the partnership may offset against the redemption price payable to the withdrawn partner all other amounts owing from the withdrawn partner to the partnership, regardless of whether currently due.

Section 152.605 provides that interest owed under Sections 152.602-152.604 accrue from the date of withdrawal to the date of payment.

Section 152.606 requires the partnership to indemnify a withdrawn partner against all partnership liabilities incurred before the withdrawal except for liabilities then unknown to the partnership and liabilities incurred by an act of the withdrawn partner after withdrawal under Section 152.504.

Section 152.607(a) provides that, if no agreement for the purchase of the withdrawn partner's interest is reached within one hundred twenty days after the written demand for payment by other party, then within thirty days thereafter the partnership must either pay in cash to the withdrawn partner the amount the partnership estimates to be the net redemption price or make written demand for payment of its estimate of the net amount owed by the withdrawn partner to the partnership. Section 152.607(b) provides that if a deferred payment of the redemption price is authorized under Section 152.608 or an amount is owed by the withdrawn partner to the partnership, the partnership may tender a written offer to pay or deliver a written statement of demand for the amount that it estimates to be the net amount owed to it, stating the amount and other terms and conditions of the obligation. Section 152.607(c) provides that a withdrawn partner may request and receive certain financial information from the partnership and an explanation of the computation of any estimated payment obligation. Further, this Section permits the partnership to request and receive from the withdrawn partner an explanation of the amount the partner believes to be due. Section 152.607(d) sets forth a mechanism for eliminating the period of time during which the payments or tenders under Section 152.603 or Section 152.604 may be challenged by the other party.

Section 152.608 permits a partnership to defer payment of the redemption price to a partner who lawfully withdraws before the expiration of a definite term, the completion of a particular undertaking or the occurrence of a specified event, unless the partner establishes to the satisfaction of the court that the earlier payment will not cause undue hardship to the partnership.

Section 152.609 provides that the withdrawn partner or the partnership may maintain an action against the other party to determine the terms of redemption of the partner's interest.

Section 152.610 provides that if an event requiring winding up occurs within sixty days of a partner's withdrawal, then the partnership may defer paying a redemption price until the partnership makes a winding up distribution to the remaining partners. Further, this Section provides that the redemption price or the contribution obligation of the withdrawn partner is the amount the withdrawn partner would have received or contributed if the event requiring a winding up had occurred at the time of the partner's withdrawal.

Section 152.611(a) sets forth certain circumstances upon which a partnership must redeem the partnership interest of a transferee for its fair value. Section 152.611(b) is similar to Section 152.607 and provides that if no agreement for the redemption price of a transferee's interest is reached within one hundred twenty days after written demand for redemption, then within thirty days the partnership must pay in cash to the transferee the amount the partnership estimates to be the redemption price, plus accrued interest

from the date of demand. Section 152.611(c) requires the payment to the transferee, on request of the transferee, to be accompanied or followed by the same type of information that is required by Section 152.607(c) with respect to a withdrawn partner. Section 152.611(d) provides that if the payment to a transferee is accompanied by written notice that payment is in full satisfaction of the partnership's obligation, then the payment shall be the redemption price unless within one year of the written notice the transferee commences an action to determine the redemption price.

Section 152.612 permits a transferee to maintain an action against the partnership to determine the purchase price of the transferee's interest.

Subchapter I. Supplemental Winding Up and Termination Provisions

Subchapter I contains provisions pertaining to the winding up and termination of a partnership, in addition to those set forth in Chapter 11.

Section 152.701 provides that on the occurrence of an event requiring winding up (i) the partnership continues until the winding up of its business is completed, at which time the partnership is terminated, and (ii) the relationship among the partners is changed as provided by Subchapter I.

Section 152.702 specifies the persons eligible to wind up the partnership business.

Section 152.703 specifies the rights and duties of a person winding up the partnership business.

Section 152.704 provides that partners have the power to bind the partnership after an event requiring a winding up only in transactions that are appropriate for winding up the partnership business or, if the party does not have notice of the event requiring a winding up, in transactions that would bind the partnership under Sections 152.301 and 152.302.

Section 152.705 sets forth the rights of partners among themselves with respect to a post-dissolution liability. Subsection (a) provides that, after an occurrence of an event requiring winding up, the losses with respect to which a partner must contribute include losses from any liabilities incurred under Section 152.704. Subsection (b) provides that a partner who, with notice that an event requiring a winding up has occurred, incurs a partnership liability by an act that is not appropriate for winding up the partnership business is liable to the partnership for any loss caused to the partnership arising from that liability.

Section 152.706 provides that in winding up the partnership business, the property of the partnership must first be applied to discharge the partnership's obligation to creditors, with anything remaining to be paid to partners in cash. This Section further provides that creditors who are partners are on parity with other creditors.

Section 152.707 provides that each partner is entitled to a settlement of all partnership accounts on winding up of the partnership business. This Section further specifies the manner in which such accounts are to be settled and provides (i) that the partnership shall make a distribution to a partner in an amount equal to that partner's positive capital account balance and (ii) subject to the provisions governing registered limited liability partnerships, that a partner shall contribute to the partnership an amount equal to that partner's negative balance in the partner's capital account.

Section 152.708 provides that, to the extent not taken into account in settling the partner's accounts, each partner must contribute, in proportion to the partner's sharing of partnership losses, the amount necessary to satisfy partnership obligations (exclusive of any liabilities that creditors have agreed are nonrecourse).

Section 152.709(a) provides that an agreed continuation of the partnership by all

the partners after an event that would otherwise require winding up effectively amends the partnership agreement to delete the requirement to wind up on that event. Section 152.709(b) provides that if the partnership is continued by the partners for ninety days without any settlement or liquidation of the business, and without any objection from any partner, the continuation is *prima facie* evidence of an agreement by all the partners to continue the business. Section 152.709(c) provides that the continuation of the business by those who habitually acted in the business before the notice, other than the partner giving the notice, without any settlement or liquidation of the partnership business, is *prima facie* evidence of an agreement to continue the partnership. Subsections (d) and (e) specify what partners must agree in writing to revoke a voluntary decision to wind-up and continue the business of the partnership under Section 11.151.

Section 152.710 requires all remaining partners, unless another group or percentage is specified in the partnership agreement, to agree in writing to reinstate and continue the business of the partnership under Section 11.202.

Subchapter J. Limited Liability Partnerships

Section 152.801(a) provides that except as provided by Subsection (b), a partner in a limited liability partnership is not individually liable, directly or indirectly, for a debt or obligation of the partnership incurred while the partnership is a limited liability partnership. Section 152.801(b) sets forth the instances in which a partner in a limited liability partnership is individually liable for a debt or obligation of the partnership arising from the errors or omissions of another partner or a representative of the partnership. Section 152.801(c) provides that Sections 2.101(1), 152.305 and 152.306 do not limit the effect of Subsection (a) in a limited liability partnership. Section 152.801(d) sets forth the definition of "representative" for purposes of this Section. Section 152.801(e) provides that Subsections (a) and (b) do not effect (i) the liability of the partnership to pay its debts and obligations from partnership property, (ii) the liability of a partner, if any, imposed by law or contract independently of the partner's status as a partner, or (iii) the manner in which service of citation or other civil process may be served in an action against the partnership.

Section 152.802(a) sets forth the information that must be contained in the application filed by a partnership seeking to register as a limited liability partnership. Section 152.802(b) specifies the requirements as to who must sign the application. Section 152.802(c) provides that a partnership is registered as a limited liability partnership by the Secretary of State on the date on which a completed initial or renewal application is filed or a later date specified in such application. Section 152.802(d) provides that a registration is not affected by later changes in the partners of the partnership. Section 152.802(e) specifies the term for which the registration of a limited liability partnership is effective. Section 152.802(f) provides that a registration may be withdrawn by filing a withdrawal notice with the Secretary of State in accordance with Chapter 4 and specifies the contents of the withdrawal notice and the requisite signature requirements. Section 152.802(g) provides that an effective registration may be renewed before its expiration by filing an application with the Secretary of State in accordance with Chapter 4. This Section further provides that a renewal application continues an effective registration for one year after the date the registration would otherwise expire and sets forth the information the renewal application must contain. Section 152.802(h) provides that the Secretary of State may remove from its active records the registration of a partnership the registration of which has either been withdrawn or revoked or expired and not renewed. Section 152.802(i) provides that the Secretary of State is not responsible for determining whether a partnership is in compliance with the insurance or financial responsibility requirements set forth in Section 152.804(a). Section 152.802(j) contains provisions dealing with the amendment of documents filed under this Subchapter.

Section 152.803 provides that the name of a limited liability partnership must comply with Section 5.063.

Section 152.804 contains provisions specifying the insurance or other financial requirements a limited liability partnership must comply with.

Section 152.805 provides that a limited partnership may become a limited liability partnership by complying with the applicable provisions of Chapter 153.

Subchapter K. Foreign Limited Liability Partnerships

Section 152.901(a) provides that a foreign limited liability partnership is subject to Section 2.101 with respect to its activities in the State of Texas to the same extent as a domestic registered limited liability partnership. Section 152.901(b) provides that a foreign limited liability partnership may not be denied registration because of a difference between the laws of the State under which the partnership is formed and the laws of the State of Texas.

Section 152.902 specifies that the name of a foreign limited liability partnership must comply with Section 5.063 and the requirements of the state of formation.

Section 152.903 provides that a foreign limited liability partnership is not considered to be transacting business in the State of Texas for purposes of the Code because it carries on in this State one or more of the activities listed in Section 9.101.

Section 152.904 provides that a foreign limited liability partnership subject to this Chapter must maintain a registered office and registered agent in accordance with Chapter 5.

Section 152.905 provides that before transacting business in the State of Texas, a foreign limited liability partnership must file an application for registration in accordance with Chapter 4. This Section specifies the time at which a partnership is registered as a foreign limited liability partnership and further states that a registration is not affected by later changes in the partners of the partnership. Finally, this Section specifies that the registration of a foreign limited liability partnership is effective until the first anniversary of the date after the date of registration or a later effective date, unless the statement is withdrawn or revoked at an earlier time or renewed in accordance with Section 152.908.

Section 152.906 provides that a registration may be cancelled by filing a certificate of cancellation. This Section also specifies the information that the certificate of cancellation must contain.

Section 152.907 provides that a certificate of cancellation terminates the registration of the partnership as a foreign limited liability partnership as of the date on which the notice is filed or a later date specified in the notice, but not later than the expiration date.

Section 152.908 provides that an effective registration may be renewed before its expiration by filing a renewal application for registration with the Secretary of State in accordance with Chapter 9. This Section further sets forth what information the renewal application must contain and states that an application for registration filed under this Section continues an effective registration for one year after the date the registration would otherwise expire.

Section 152.909 provides that the Secretary of State may remove from its active records the registration of a foreign limited liability partnership, the registration of which has (i) been withdrawn or revoked or (ii) expired and not renewed.

Section 152.910(a) provides that a foreign limited liability partnership that transacts business in the State of Texas without being registered is subject to Subchapter B, Chapter 9. Section 152.910(b) provides that a partner of a foreign limited liability partnership is not liable for a debt or obligation of the partnership solely because the partnership transacted business in the State of Texas without being registered.

Section 152.911 provides that a document filed under this Subchapter may be amended by filing with the Secretary of State an application for amendment for registration in accordance with Chapter 4. This Section further specifies the information that must be contained in an application for amendment.

Section 152.912 specifies the execution requirements with respect to an application for amendment.

Section 152.913 specifies the requirements for execution of a statement of a change of registered office or registered agent of a foreign limited liability partnership.

CHAPTER 153. LIMITED PARTNERSHIPS

Subchapter A. General Provisions

Section 153.001 provides that the term "other limited partnership provisions" shall mean the provisions of Chapters 151 and 154 and of Title 1 to the extent applicable to limited partnerships. This is a new definition.

Section 153.002(a) provides that Chapter 153 and the other limited partnership provisions shall be applied and construed to affect its general purpose to make uniform the law with respect to limited partnerships among states that have similar laws. Section 153.002(b) provides that the rule that a statute in derogation of the common law is to be strictly construed does not apply to Chapter 153 and the other limited partnership provisions.

Section 153.003 provides that in a case not provided for by Chapter 153 and the other limited partnership provisions, the applicable provisions of Chapters 152 and 154 governing partnerships that are not limited partnerships and the rules of law and equity govern. The provisions of subsections (b) and (c) of Section 153.003 are new and are clarifications necessitated by the new structure of the Code. The definition of "partner" in Chapter 1 includes limited partners but should not be applied to limited partners in certain provisions. In particular, the provisions of Chapter 152 governing general partnerships are generally inconsistent with the nature of a limited partner, even though there is no literal conflict with the provisions of Chapter 153. This Section clarifies that Chapter 152 does not apply to limited partners if it would be inconsistent with the nature and role of a limited partner as contemplated by Chapter 153.

Section 153.004 lists the provisions of Title 1 that may not be waived or modified by the partnership agreement or that may be waived or modified only in certain circumstances. This is a new provision but similar to Section 152.002(b)(9). It has been added for the same reasons as explained for that section.

Section 153.005 provides that rights granted to a third party may not be waived or modified in the Partnership Agreement unless the third party consents to the waiver or modification.

Subchapter B. Supplemental Provisions Regarding Amendment to Certificate of Formation

Section 153.051(a) sets forth events the occurrence of which require that the general partner file a certificate of amendment not later than the thirtieth day after the date on which the event occurred. Section 153.051(b) provides that general partners are required to properly correct false statements in the certificate of formation, including those resulting from changed circumstances.

Section 153.052(a) provides that a certificate of information may be amended at any time for a proper purpose as determined by the general partners. Section 153.052(b) provides that a certificate of formation may be amended to state the name, mailing address and street address of the business or residence of each person winding up the limited partnership's affairs if, after an event requiring winding up of the limited partnership but before the limited partnership is reconstituted or a certificate of cancellation is filed, (i) the certificate of formation has been amended to reflect the withdrawal of all general partners or (ii) a person who is not shown on the certificate of formation as a general partner is carrying out the winding up of a limited partnership's affairs. Section 153.052(c) provides that if a certificate of formation is amended under Section 153.052(b), each person winding up the limited partnership's affairs shall execute and file the certificate of amendment. This Section also provides that a person winding up the partnership's affairs is not subject to the liabilities of general partner because of the filing of the certificate of amendment. Section 153.052(d) provides that a general partner who is not winding up the limited partnership's affairs is not required to execute

and file a certificate of amendment as provided by Section 153.052.

Subchapter C. Limited Partners

Section 153.101 provides when a person becomes a limited partner. This Section also provides that any person may be a limited partner unless the person lacks capacity apart from Chapter 153 and the other limited partnership provisions.

Section 153.102(a) states that, except as provided by Section 153.102(c), a limited partner is not liable for the obligations of the a limited partnership unless (i) the limited partner is also a general partner or (ii) in addition to the exercise of the limited partner's rights and powers as a limited partner, the limited partner participates in the control of the business. Section 153.102(b) provides that if a limited partner participates in the control of the business, the limited partner is only liable to a person who transacts business with the limited partnership reasonably believing, based on the limited partner's conduct, that the limited partner is also a general partner. Section 153.102(c) provides that, except as otherwise provided, a limited partner who knowingly permits its name to be used in the name of the limited partnership is liable to a creditor who extends credit to the limited partnership without actual knowledge that the limited partner is not a general partner.

Section 153.103 sets forth a list of activities a limited partner may engage in or have the right to engage in without being deemed to take part in the control of the business of the limited partnership.

Section 153.104 provides that the list of activities enumerated in Section 153.103 is non-exclusive.

Section 153.105 provides that Sections 153.102(c) 153.103 and 153.104 do not create rights of limited partners; rather, such rights may be created only by (i) the certificate of formation, (ii) the partnership agreement, (iii) other Sections of Chapter 153 or (iv) other limited partnership provisions.

Section 153.106 sets forth certain protective steps a person can take who has made a contribution to a limited partnership and erroneously believes is a limited partner thereof, including filing with the Secretary of State a written statement in accordance with Section 153.107.

Section 153.107 sets forth the requirements with respect to a written statement filed under Section 153.106(2) and provides that such statement is effective for one hundred eighty days.

Section 153.108 sets forth the actions a person must take for protection against liability if an appropriate certificate of formation or certificate of amendment has not been filed before the expiration of the one hundred eighty day period for a written statement.

Section 153.109 imposes liability on a contributor to a limited partnership who erroneously believes he is a limited partner to third parties who deal with the partnership before such contributor takes any of the steps set forth in Section 153.106, provided (i) the contributor had knowledge or notice that no certificate had been filed or that the certificate inaccurately referred to the contributor as a general partner and (ii) the third party reasonably believed, based on the contributor's conduct, that the contributor was a general partner at the time of the transaction and extended credit to the partnership in reasonable reliance on the credit of the contributor.

Section 153.110 provides that a limited partner may withdraw from a limited partnership on the occurrence of an event specified in a written partnership agreement and in accordance with the partnership agreement.

Section 153.111 provides that, except as provided in Subchapter C or in the partnership agreement, on withdrawal a withdrawing limited partner is entitled to receive, not later than a reasonable time after withdrawal, the fair value of that limited partner's interest in the limited partnership as of the date of withdrawal.

Section 153.112 provides that a limited partner who receives a wrongful distribution (i.e., a distribution not permitted under Section 153.210) is not required to return the distribution unless the limited partner knew that the distribution violated the prohibition of Section 153.210.

Section 153.113 provides that in the instance of a deceased or incapacitated limited partner, the rights of the limited partner shall be conferred on the limited partner's representative.

Subchapter D. General Partners

Section 153.151 sets forth how additional general partners may be admitted to a limited partnership after its formation. This Section further provides that a person may be a general partner unless a person lacks capacity apart from Chapter 153.

Section 153.152 sets forth the general powers and liabilities of a general partner in a limited partnership. Subsection (a) states that, except as provided in Chapter 153 and the other limited partnership provisions or in a partnership agreement, a general partner of a limited partnership (i) has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners and (ii) has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners. Subsection (b) states that, except as provided by Chapter 153 and the other limited partnership provisions, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to a person other than the partnership and the other partners.

Section 153.153 sets forth the power and liabilities of the person who is both a general partner and a limited partner.

Section 153.154 provides that a general partner of a limited partnership may make a contribution to, be allocated profits and losses of, and receive a distribution as a general partner, a limited partner, or both.

Section 153.155(a) sets forth a list of events which constitute events of withdrawal and provides that a person ceases to be a general partner upon the occurrence of an event of withdrawal. Section 153.155(b) provides that a general partner may withdraw at any time from a limited partnership and cease to be a general partner by giving written notice to the other partners.

Section 153.156 provides that if an event of withdrawal is attributable to an insolvency or bankruptcy event enumerated in Section 153.155(a)(4) or (5), the subject general partner shall notify the other partners of the event not later than the thirtieth day after the date on which the event occurred.

Section 153.157 provides that unless otherwise set forth in the partnership agreement, a withdrawal by a general partner of a partnership for a definite term or a particular undertaking before the expiration of that term or completion of the undertaking is a breach of the partnership agreement.

Section 153.158(a) provides that unless otherwise set forth in a written partnership agreement, if a general partner ceases to be a general partner by virtue of the occurrence of the event of withdrawal, the remaining general partners, or if there are no remaining general partners, a majority in interest of the limited partners, may take certain actions with respect to the withdrawing general partner, including converting that general partner's partnership interest to that of a limited partner. Section 153.158(b) provides

that until an action described in Section 153.158(a) is taken, the owner of the partnership interest of the withdrawn general partner has the status of an assignee. Section 153.158(c) provides that if there are no remaining general partners following the withdrawal of the general partner, the partnership may be reconstituted in accordance with Section 153.503.

Section 153.159 provides that if the partners convert a partnership interest under the circumstances described in Section 153.158, the limited partnership interest may be reduced pro rata with all other partners to provide compensation, an interest in the partnership, or both, to a replacement general partner.

Section 153.160 sets forth the voting rights of a withdrawn general partner after an amendment to the certificate of formation reflecting the general partner's withdrawal as a general partner is filed.

Section 153.161 provides that a withdrawn general partner is not personally liable as a general partner for partnership debt incurred post-withdrawal unless the applicable creditor at the time the debt was incurred reasonably believed that the partner remained a general partner. This Section further provides when a creditor of the partnership is deemed to have reason to believe that a partner remains a general partner.

Section 153.162 provides that if a general partner's withdrawal from a limited partnership violates the partnership agreement, the partnership may recover damages from the withdrawing general partner for breach of the partnership agreement. This section further provides that in addition to other remedies, the partnership may effect the recovery of damages by offsetting them against the amount otherwise distributable to the withdrawing general partner, reducing the limited partnership interest into which the withdrawing general partner's interest maybe converted, or both.

Subchapter E. Finances

Section 153.201 provides that the contribution of a limited partner may consist of a tangible or intangible benefit to the limited partnership or other property of any kind or nature.

Section 153.202(a) provides that no promise by a limited partner to pay cash or transfer property to a limited partnership is enforceable unless set out in a writing signed by the limited partner. Section 153.202(b) provides that a partner and the partner's successors are bound to perform the partner's contribution obligation. Section 153.202(c) provides that a partner and the partner's successors are required to contribute cash to the limited partnership in an amount equal to the value of outstanding, unperformed contribution obligations that are not performed as required. Section 153.202(d) provides that a partnership agreement may specify consequences that can result from the failure of a partner to satisfy the partner's financial obligations to the limited partnership.

Section 153.203 provides that, unless otherwise set forth by the partnership agreement, a partner's obligation to the partnership may not be compromised or released without the consent of all of the partners.

Section 153.204 provides that even if the partners compromise or release a partner's obligation to the partnership, a creditor of the limited partnership who extends credit, or otherwise acts, in reasonable reliance on that obligation while it is enforceable is not precluded from enforcing the partner's obligation.

Section 153.205 provides that a conditional obligation (which includes a contribution payable on a discretionary call of a limited partnership before the time the call occurs) of a limited partner may not be enforced by a partnership creditor unless the condition of the obligation has been satisfied or waived as to or by the limited partner.

Section 153.206 provides that the profits and losses of a limited partnership are to

be allocated among the partners in a manner provided by a written partnership agreement. If a written partnership agreement does not provide for the allocation of profits and losses, the profits and losses are to be allocated (i) in accordance with the current percentage or other interest in the partnership stated in the partnership's records or (ii) if the allocation of profits and losses is not provided for in the partnership records, in proportion to capital accounts.

Section 153.207 provides that, with certain exceptions, a partner who is entitled to receive a distribution from the partnership has the same status and is entitled to all remedies available to a creditor of the limited partnership.

Section 153.208 sets forth the general rule that the terms of the partnership agreement govern the sharing of distributions of cash and other assets of the limited partnership among the partners. If the partnership agreement, however, fails to state the basis for sharing distributions, this Section provides that distributions be shared in one of two ways: (i) distributions that are a return of capital are to be shared on the basis of the agreed value of each partner's contributions that have not been returned to the partner and (ii) distributions that are not a return of capital are to be shared in proportion to the allocation of profits as determined under Section 153.206.

Section 153.209 provides that, with certain exceptions, a partner is entitled to receive a distribution from a limited partnership to the extent and at the times or on the occurrence of events specified in the partnership agreement before the partner withdraws from the partnership and before the winding up of the partnership business.

Section 153.210 provides that a limited partnership may not make a distribution to a partner if, immediately after the distribution, the limited partnership's total liabilities (subject to certain exceptions) exceed the fair value of the limited partnership's total assets.

Subchapter F. Partnership Interests

Section 153.251 provides that a partnership interest may be wholly or partly assigned. This Section further provides that an assignment of a partnership interest does not dissolve a limited partnership, does not entitle the assignee to become, or to exercise the rights or powers of a partner and entitles the assignee to be allocated income, gain, loss, deduction, credit or similar items and to receive distributions to which the assignor was entitled to the extent those items are assigned.

Section 153.252 provides that until an assignee becomes a partner, the assignor partner continues to be a partner in the partnership. This Section further provides, however, that on the assignment by a general partner of all the general partner's rights as a general partner, the general partner's status as a general partner may be terminated by the affirmative vote of majority in interest of the limited partners.

Section 153.253 provides that an assignee of a partnership interest may become a limited partner if and to the extent that (i) the partnership agreement provides or (ii) all partners consent. This Section further provides that an assignee who becomes a limited partner, to the extent of the rights and powers assigned, has the rights and powers and is subject to the liabilities of a limited partner under a partnership agreement and the Code.

Section 153.254(a) provides that until an assignee of a partnership interest becomes a partner, the assignee does not have liability as a partner solely as a result of the assignment. Section 153.254(b) specifies the liability of an assignee who becomes a limited partner.

Section 153.255 provides that an assignor is not released from liability to the partnership for, among other things, its obligation to make agreed upon contributions or to return wrongfully received distributions, regardless of whether an assignee of a partnership interest becomes a limited partner.

Section 153.256 contain provisions pertaining to the ability of a judgment creditor of a partner to obtain a charging order against such partner's partnership interest and the rights and remedies available if a partnership interest is so charged.

Section 153.257 provides that Section 153.256 does not deprive a partner of the benefit of any exemption law applicable to that partner's partnership interest.

Subchapter G. Reports, Records and Information

Section 153.301 provides that the Secretary of State may require a domestic limited partnership or a foreign limited partnership registered to transact business to file a report of the type contemplated by Section 153.302 not more than once every four years.

Section 153.302 specifies the contents of the report.

Section 153.303 states that the filing fee for the report shall be as provided in Chapter 4.

Section 153.304 provides that the report must be delivered to the Secretary of State not later than the thirtieth day after the date on which the notice specified in Section 153.305 is mailed. This Section eliminates the requirements in existing law that two (2) copies of the report must be delivered.

Section 153.305 provides that the Secretary of State shall send a notice that the report required under Section 153.301 is due and specifies the contents of the notice. This Section further provides that the Secretary of State shall include with the notice a copy of the report form.

Section 153.306 sets forth the actions the Secretary of State is required to take if the Secretary of State finds that the report complies with this Subchapter. This Section also specifies the effect of filing the report.

Section 153.307 provides that a domestic or foreign limited partnership that fails to file timely a report under Section 153.301 forfeits the limited partnership's right to transact business in the State of Texas.

Section 153.308 specifies the address at which notice of a forfeiture of a right to transact business must be mailed.

Section 153.309 specifies the effects on a limited partner arising from its forfeiture of a right to transact business in the State of Texas.

Section 153.310 specifies the procedure by which a limited partnership that may revive its right to transact business in the State of Texas after having forfeited such right under Section 153.307.

Section 153.311 provides that the Secretary of State may cancel the certificate of formation of a domestic limited partnership or the registration of a foreign limited partnership if the limited partnership has forfeited its right to transact business in the State of Texas under Section 153.307 and fails to revive that right under Section 153.310.

Section 153.312 sets forth the procedure by which a limited partner may reinstate a certificate of formation or registration which has been canceled as provided by Section 153.311.

Subchapter H. Limited Partnership as Limited Liability Partnership

Section 153.351 sets forth the requirements a limited partnership must comply with in order to register as a limited liability partnership.

Section 153.352 provides that for purposes of applying the limited liability partnership provisions contained in Chapter 152 to a limited partnership: (i) an application to become a limited liability partnership or to withdraw registration must be signed by at least one general partner, and (ii) other references to a partner mean a general partner only.

Section 153.353 provides that if a limited partnership is a limited liability partnership, Section 152.801 applies to a general partner and to a limited partner who is liable under other provisions of Chapter 153 for the debts or obligations of the limited partnership.

Subchapter I. Derivative Actions

Section 153.401 sets forth the conditions to a limited partner bringing an action derivatively for a limited partnership.

Section 153.402 provides that the plaintiff in a derivative action must be a limited partner at the time of bringing suit and either (i) must have been a limited partner at the time of the transaction that is the subject of the action, or (ii) the person's status as a limited partner must have arisen by operation of law or under the terms of the partnership agreement from a person who was a limited partner at the time of the transaction.

Section 153.403 provides that in a derivative action, the plaintiff must plead efforts to have the general partner sue or reasons for not making the effort.

Section 153.404 provides that in a derivative action, the court has the discretion to require the plaintiff to give security for the defendant's expected expenses of defense.

Section 153.405 states that if a derivative action is successful or anything is received by the plaintiff as a result of a judgment, compromise or settlement, the court may award the plaintiff reasonable attorney's fees and expenses and direct the plaintiff to remit to parties identified by the court the remainder of the proceeds received by the plaintiff.

Subchapter J. Cancellation of Certificate of Formation

Section 153.451 provides that a limited partnership shall cancel its certificate of formation by filing a certification of cancellation with the Secretary of State in accordance with Chapter 4: (i) on the completion of the winding up of the partnership business, (ii) when there are no limited partners, or (iii) subject to certain exceptions, upon a merger or conversion as provided by Chapter 10. Subchapter (c) provides that all remaining partners, or another group or percentage of partners specified in the partnership agreement, must agree to reinstate and continue the business of the limited partnership under Section 11.202.

Section 153.452 sets forth the items of information that must be included in a certificate of cancellation.

Subchapter K. Supplementary Winding Up and Termination Provisions

Section 153.501 sets forth certain circumstances whereby the limited partnership may cancel or revoke an event requiring a winding up and the partners may continue the business of the limited partnership. All remaining partners, or another group or percentage of partners specified by the partnership agreement, must agree to revoke a voluntary decision to wind up and continue the business of the limited partnership under Section 11.151.

Section 153.502 provides that the winding up of the partnership's affairs shall be accomplished by either the general partners who have not wrongfully dissolved the limited partnership or, in the absence of such general partners, the limited partners or a

person chosen by the limited partners. On application by or for a partner, a court, on cause shown, may wind up a limited partnership, appoint a liquidator and make other orders and inquiries as required.

Section 153.503 provides that a person winding up the limited partnership's business may take the action specified in Sections 11.052 and 11.053.

Section 153.504 sets forth the priority for disposition of partnership assets in the course of winding up.

Subchapter L. Miscellaneous Provisions

Section 153.551 specifies the records that a domestic limited partnership is required to maintain.

Section 153.552 provides that on written request stating a proper purpose, a partner or an assignee of a partnership interest may examine and copy, in person or through a representative, records required to be kept under Section 153.551 and other information regarding the business, affairs and financial condition of the limited partnership as is just and reasonable for the person to examine and copy. This Section also contains other provisions relating to the examination and copying of such records and other information.

Section 153.553 specifies the person or persons who must execute each certificate required by the Code to be filed by a limited partnership with the Secretary of State. This Section also provides that such certificates are executed subject to penalties for perjury for inaccuracies.

Section 153.554 provides that if a person fails or refuses to execute a certificate as required by Chapter 153 or to execute a partnership agreement, another person adversely affected by the failure or refusal may petition the court to direct the execution or filing of the certificate or the execution of the partnership agreement, as appropriate.

Section 153.555 provides that the transfers enumerated in such Section are not prohibited under the Section 6.12(a) of the Texas Racing Act.

CHAPTER 154. PROVISIONS APPLICABLE TO BOTH GENERAL AND LIMITED PARTNERSHIPS

Subchapter A. Partnership Interests

Section 154.001(a) provides that a partner's partnership interest is personal property for all purposes. Section 154.001(b) provides that partner's partnership interest may be community property under applicable law. Section 154.001(c) provides that a partner is not a co-owner of partnership property.

Section 154.002 provides that a partner does not have an interest that can be transferred, voluntarily or involuntarily, in partnership property.

Subchapter B. Partnership Agreement

Section 154.101 provides that a written partnership agreement may establish or provide for the future creation of additional classes or groups of one or more partners that have certain express relative rights, powers and duties. The future creation of additional classes or groups may be expressed in a partnership agreement or at the time of creation of a class or group. The rights, powers or duties of a class or group of partners may be senior to those partners of an existing class or group.

Section 154.102 provides that a written partnership agreement that accords partners voting rights may contain provisions relating to procedural matters in respect of the exercise of such voting rights.

Section 154.103 provides that prompt notice of the taking of an action by fewer than all of the partners without a meeting must be given to the partners who did not consent to the action in writing.

Subchapter C. Partnership Transactions and Relationships

Section 154.201 provides that, except as otherwise provided by the partnership agreement, a partner may lend money to and transact other business with a partnership and, subject to other applicable law, such partner has the same rights and obligations with respect to those matters as a person who is not a partner.

Section 154.202 provides that the relationships between a partnership and its creditors are not affected by the withdrawal of a partner or addition of a new partner.

Section 154.203 pertains to distributions in kind and provides that, except as provided by the partnership agreement: (i) a partner, regardless of the nature of the partner's contribution, is not entitled to demand or receive from a partnership a distribution in any form other than cash and (ii) a partner may not be compelled to accept a disproportionate distribution of an asset in kind from a partnership to the extent that the percentage portion of assets distributed to the partner exceeds the percentage of those assets that equals the percentage in which the partner shares in distributions from the partnership.

TITLE 5. BUSINESS TRUSTS

CHAPTER 200. REAL ESTATE INVESTMENT TRUSTS

Subchapter A. General Provisions

Subchapter A contains general provisions relating to Chapter 200.

Section 200.001 sets forth the definition of "real estate investment trust" for purposes of this chapter.

Section 200.002 incorporates the law of for-profit corporations to the extent Chapter 200 or Title 1 has no provision governing an issue. An unincorporated trust that is not a real estate investment trust is considered to be an unincorporated association.

Section 200.003 states that Chapter 200 controls over conflicting provisions in Chapters 20 and 21 governing for-profit corporations.

Section 200.004 states that lack of capacity of a real estate investment trust is not a defense at law or in equity and the act or transfer of property by a real estate investment trust is not invalid by the act or transfer was beyond the scope of the purpose for the trust or inconsistent with a limitation on authority of an officer or trust manager. However, a shareholder may enjoin the act or transfer of property and the real estate investment trust has an action against the officer or trust manager who exceeds authority. If the court enjoins the performance of a contract, the other party may recover resulting damages from the real estate investment trust.

Section 200.005 authorizes a real estate investment trust to engage in activities mandated or authorized by the Internal Revenue Code and related regulations, subject to limitations in the trust certificate of formation, the Code or another law of the State of Texas.

Section 200.006 permits a filing instrument to be signed by an officer of the real estate investment trust.

Subchapter B. Formation and Governing Documents

Subchapter B contains provisions relating to the formation of a real estate investment trust and its governing documents and organization. The requirement that a real estate investment trust have \$1,000 of minimum capital has been deleted as outmoded and unnecessary. A \$1,000 minimum capitalization in today's terms does not provide anyone any comfort as to adequate capitalization. This change mirrors a change in the for-profit corporation provisions in Title 2. The \$1,000 minimum capital provisions are currently found in TREITA Sections 3.10(A)(9) and 15.10(A)(3).

Section 200.051 specifies that a declaration of trust is the certificate of formation of a real estate investment trust.

Section 200.052 provides that a shareholder of a real estate investment trust does not have a vested property right resulting from the certificate of formation.

Section 200.053 specifies that the trust managers must adopt a resolution stating the proposed amendment in order to adopt an amendment to the certificate of formation and follow the procedures specified in Sections 200.053 through 200.057. An amendment may be contained in a restated certificate of formation.

Section 200.054 provides that the trust managers may amend the certificate of formation if the real estate investment trust has no outstanding shares.

Section 200.055 specifies that the resolution adopted by the trust managers must

direct that the proposed amendment be submitted to a vote of shareholders at a meeting if the real estate investment trust has any outstanding shares.

Section 200.056 specifies the procedures for notice of and meeting of shareholders to consider a proposed amendment to the certificate of formation. The proposed amendment must be adopted by the affirmative vote of shareholders required by Section 200.262.

Section 200.057 specifies the procedures for adopting a restated certificate of formation. Shareholder approval is not required if no amendment is effected. The section specified whether an officer or the trust managers must sign the restated certificate of formation.

Section 200.058 requires the trust managers to adopt initial bylaws which regulate and manage the affairs of the real estate investment trust in a manner consistent with law and the certificate of formation. The bylaws may be amended or repealed and new bylaws adopted by the trust managers unless the certificate of formation or Chapter 200 reserves the power to the shareholders or unless the shareholders expressly provide that the trust managers may not amend repeal or readopt a bylaw that has been amended, repealed or adopted by the shareholders.

Section 200.059 states that the shareholders may amend, repeal or adopt bylaws unless the certificate of formation or bylaw adopted by the shareholders provides otherwise.

Section 200.060 requires the initial trust managers to hold an organization meeting and specifies the notice and call requirements for the meeting.

Subchapter C. Shares

Subchapter C contains provisions relating to the shares issued by a real estate investment trust.

Section 200.101 states that the number of shares that a real estate investment trust may issue must be stated in the certificate of formation.

Section 200.102 provides that a real estate investment trust certificate of formation may create classes of shares with specified preferences, rights, restrictions and qualifications consistent with law.

Section 200.103 authorizes the trust managers to classify or reclassify unissued shares by setting or changing their preferences, rights, voting powers, restrictions, limitations as to dividends, qualifications or terms or conditions of redemption, if authorized by the certificate of formation. A statement of designation containing a description of the shares must be filed with the county clerk of the county of the principal place of business of the real estate investment trust.

Section 200.104 specifies that shares may not be issued until the consideration has been paid to the real estate investment trust or its wholly-owned subsidiary. A shareholder becomes entitled to the shares when the consideration is paid.

Section 200.105 specifies the types of consideration for which shares with or without par value may be issued. This Section expands the kind of property that can serve as consideration for stock to conform to the corporate law.

Section 200.106 specifies that the consideration for the issuance of shares must be determined by the trust managers.

Section 200.107 states that the consideration for the issuance of shares with par value must at least equal the par value.

Section 200.108 states that, in the absence of fraud in the transaction, the judgment of the trust managers or shareholders, as appropriate, is conclusive in determining the value of the consideration received for the shares.

Section 200.109 limits the personal liability of an assignee or transferee of shares or a subscription for shares who acted in good faith and without knowledge that the full consideration for the shares or subscription had not been paid.

Section 200.110 specifies how a real estate investment trust accepts a subscription and specifies that a preformation subscription is irrevocable for six months unless the subscription provides for a longer or shorter period or all of the other subscribers agree that the subscription may be revoked. A post formation written subscription is a contract between the subscriber and the real estate investment trust. The provisions of TREITA Section 7.10 relating to subscriptions for shares were based on the similar provisions of TBCA Art. 2.14. These provisions have become antiquated and are rarely invoked. Sections 200.110-200.112 contain revised provisions that modernize the law relating to subscriptions, are based primarily on the subscription provisions contained in the Revised Model Business Corporation Act and are intended to parallel similar revisions to the subscription provisions in Chapter 21.

Section 200.111 provides that the real estate investment trust may determine payment terms of a preformation subscription unless the terms are specified in the subscription. The real estate investment trust must make uniform calls on the subscription and may collect the subscription like any other debt. Defaulting subscribers forfeit amounts previously paid on the subscription.

Section 200.112 specifies that written commitments to act in a specified manner with respect to shares after their acquisition are binding. The commitment constitutes a contract between the shareholder and the real estate investment trust.

Subchapter D. Shareholder Rights and Restrictions

Subchapter D sets forth provisions relating to the rights of shareholders, restrictions on transfers of shares and ownership of shares.

Section 200.151 states that a real estate investment trust may consider, subject to the Code and Chapter 8, Business & Commerce Code, that the person registered as the owner of a share in the share transfer records as the owner of that share.

Section 200.152 provides that a shareholder does not have a preemptive right to acquire securities of the real estate investment trust unless specifically provided by the certificate of formation.

Section 200.153 specifies that shares and other securities of a real estate investment trust are personal property and transferable in accordance with Chapter 8 of the Business & Commerce Code except as otherwise provided by the Code.

Section 200.154 provides that a security of a real estate investment trust may have its transfer restricted by the certificate of formation, bylaws or a written agreement. If the real estate investment trust is a party to the agreement, a copy of the agreement must be made available for examination by interested shareholders at the principal place of business to interested shareholders. The restriction is not binding on previously issued securities unless their holders voted in favor of the restriction or entered into the restrictive agreement.

Section 200.155 specifies the requirements for the validity of a transfer restriction on a security of a real estate investment trust.

Section 200.156 authorizes a real estate investment trust to file with the county clerk of the county of the principal place of business of the real estate investment trust a

copy of a bylaw or agreement that restricts the securities of the trust. The securities must state the fact of the filing if required by Section 3.202. The trust may also make the agreement restricting the transfer part of the certificate of formation by complying with this Code or amending the certificate of formation. The contents of the certificate of amendment are specified by this section.

Section 200.157 provides that a transfer restriction is specifically enforceable against the holder or a successor or transferee of the holder if the restriction is reasonable and noted conspicuously on the certificate representing the security, or with respect to uncertificated securities, noted in the notice sent with respect to the security under Section 3.205. Otherwise the restriction is ineffective against a transferee for value without actual knowledge of the restriction's existence.

Section 200.158 provides that the real estate investment trust may transfer shares and pay distributions to a surviving joint owner when two or more persons are registered as joint owners of the shares and one owner dies. This recording and distribution may not be made after receipt of a written notice that a party other than the surviving joint owner is claiming an interest in the shares or distribution. Any cause of action existing in favor of an owner of an interest in the shares or distribution against the surviving owner is not affected by the trust's discharge.

Section 200.159 provides that a real estate investment trust or its officer, trust manager, employee or agent may not be held liable for considering a registered owner to be the owner of a share for a purpose described by Section 200.151.

Section 200.160 provides that a real estate investment trust that transfers shares or makes a distribution to a surviving joint owner under Section 200.158 before receiving a written claim is discharged from liability.

Section 200.161 specifies that a holder of shares, an owner of any beneficial interests in shares or a subscriber for shares, or any of their affiliates, may not be held liable to the real estate investment trust or its obligees for certain obligations in certain circumstances. The circumstances include a failure of the real estate investment trust to observe any corporate formality, on an alter ego theory or on the basis of actual or constructive fraud. The liability is not prevented or limited where the person perpetrated an actual fraud on the obligee primarily for the direct personal benefit of the person.

Section 200.162 provides that the limitation on liability in Section 200.161 is exclusive and preempts liability imposed under common law or otherwise.

Section 200.163 excludes from the limitations contained in Sections 200.161 and 200.162 obligations that are expressly assumed or guaranteed or for which the person is otherwise liable under the Code or other applicable statute.

Section 200.164 specifies that a pledgee of shares is not personally liable as a shareholder. Likewise, an executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors or receiver is not personally liable, although the estate and funds administered by such person may be liable.

Subchapter E. Distributions and Share Dividends

Subchapter E contains provisions governing distributions and share distributions by real estate investment trusts.

Section 200.201 provides that the trust managers may authorize a distribution and the real estate investment trust may make a distribution subject to Section 200.202 and any restriction in the certificate of formation.

Section 200.202 prohibits a real estate investment trust from making a distribution if the trust would be insolvent after the distribution or the distribution is more

than the surplus of the trust. However, a real estate investment trust may purchase or redeem its own shares under specified circumstances.

Section 200.203 provides that debt arising as a result of declaration of a distribution is general, unsecured debt unless subordinated or secured by agreement.

Section 200.204 permits the trust managers to create a reserve out of the surplus or designate or allocate part of the real estate investment trust surplus for a proper purpose.

Section 200.205 authorizes trust managers to make share dividends subject to Section 200.206 and any restrictions in the certificate of formation.

Section 200.206 prohibits a real estate investment trust from making a share dividend if its surplus is less than the amount required by Section 200.208 to be transferred to stated capital. A share dividend of one class may not be made on shares of another class unless the certificate of formation provides for the dividend or the share dividend is authorized by the shares of the shareholders in the class being dividended.

Section 200.207 states that a share dividend is issued at the par value of the shares while no par value shares are issued at the value set by the trust managers when the share dividend is authorized.

Section 200.208 requires a surplus of not less than the aggregate par value of the shares issued in a share dividend to be transferred to stated capital. The amount of surplus transferred to stated capital with respect to no par value shares is determined by the trust managers.

Section 200.209 permits the trust managers to determine the solvency of the real estate investment trust and its net assets, stated capital or surplus to be based on certain financial statements, financial information, projections, fair valuations or any combination of the foregoing.

Section 200.210 requires the determination of the solvency of the real estate investment trust or its surplus to be made on the date the distribution or share dividend is authorized by the trust managers if it is made not later than 120 days after the authorization date or on a date designated by the trust managers if a distribution or share dividend is made more than 120 days after the authorization and the date designated by the trust managers is not later than the 121st day before the date the distribution or share dividend is made. In addition, if neither of the foregoing apply, the determination is made on the date the distribution or share dividend is made if it is made more than 120 days after the authorization date. With respect to a debt, deferred payment obligation or contract to acquire any of its own shares, the date is the date the debt or obligation is incurred or the contract is made or takes effect, or on the date the shares are acquired.

Section 200.211 authorizes the trust managers to split the shares of a class of the real estate investment trust without increasing the stated capital of the trust.

Subchapter F. Shareholder Meetings; Voting and Quorum

Subchapter F contains provisions governing a shareholder meeting, voting by shareholders and the quorum required for a meeting.

Section 200.251 requires an annual meeting of shareholders to be held at the time stated in or set in accordance with the bylaws of the trust. If the meeting is not held, a shareholder may request an officer or trust manager that the meeting be held within a reasonable time, and if it is not called within 60 days, any shareholder may bring suit to compel the meeting to be held. The failure to hold a meeting does not effect a winding up or termination of the real estate investment trust. Each shareholder has an interest sufficient to institute a legal proceeding to compel a meeting.

Section 200.252 authorizes a trust manager, an officer or any other person authorized by the certificate of formation or bylaws and the holders of at least 10% of all the shares entitled to vote at the meeting to call a special meeting of shareholders. The 10% shareholder requirement may be increased or decreased by the certificate of formation but may not exceed 50% of the shares entitled to vote.

Section 200.253 requires a written notice be given to shareholders entitled to vote at the meeting not later than 10 days and not earlier than 60 days before the date of the meeting. The notice must be given in person or by mail or at the direction of the person calling the meeting. The notice of a special meeting must state the purpose of the meeting.

Section 200.254 requires the share transfer records to be closed in accordance with Section 6.101 at least 10 days immediately preceding the date of a meeting.

Section 200.255 requires the record date for the meeting to be not more than 10 days after the date on which the trust managers adopt the resolution setting the record date.

Section 200.256 states that the record date must be at least 10 days before the date on which the particular action requiring the determination of shareholders is to be taken.

Section 200.257 specifies that a quorum for a shareholders meeting is the majority of the shares entitled to vote at a meeting. The certificate of formation may provide for a different quorum of shareholders although the quorum may not be less than one-third of the shares entitled to vote. The shareholders present at a meeting may conduct business until the meeting is adjourned, and a subsequent withdrawal of a shareholder does not negate the quorum. The shareholders at a meeting where a quorum is not present may adjourn the meeting until a later time.

Section 200.258 specifies that unless the certificate of formation or bylaws require otherwise, trust managers must be elected by two-thirds of the votes cast by the holders of shares entitled to vote in the election of trust managers at a meeting at which a quorum is present. The certificate or bylaws may provide for the vote of a different portion of the shares so long as it is not less than a majority of the shares. Votes for trust managers are based on the number of shares owned by a shareholder unless cumulative voting is authorized in accordance with Section 200.259.

Section 200.259 authorizes cumulative voting for trust managers through a provision in the certificate of formation of a real estate investment trust. A shareholder who intends to cumulate votes must give prior written notice of that intention to the trust managers.

Section 200.260 provides that generally a matter other than the election of trust managers or for which a specified portion of the shares is required by this code must be approved by the affirmative vote of the holders of a majority of the shares entitled to vote and voting for, against or expressly abstaining on the matter at a shareholders meeting at which a quorum is present. The bylaws or certificate of formation of a real estate investment trust may provide that a matter other than the election of trust managers or for which a specified vote is required by this code may provide that the approval by shareholders is a specified portion but not less than a majority of the shares entitled to vote on the matter.

Section 200.261 defines a "fundamental action" to mean an amendment of a certificate of formation, a voluntary winding up, a revocation of a voluntary winding up, a cancellation of an event requiring winding up or a reinstatement. Approval by the shareholders of a fundamental action requires the affirmative vote of the holders of two-thirds of the outstanding shares entitled to vote on the fundamental action. In addition, the affirmative vote of the holders of two-thirds of the outstanding shares of each class or series entitled to vote as a class or series on the action is required.

Subsection (d) specifies what amendments to the certificate of formation require separate voting by a class or series of shares. Subsections (e) and (f) specify certain circumstances in which a separate vote of the holders of a series is not required.

Section 200.262 permits the certificate of formation to require the affirmative vote of the holders of a specified portion, but not less than a majority of the shares entitled to vote on a matter for which a specified vote is required by this title or Title 1. This result also applies to separate votes by class. These provisions may not be amended without the affirmative vote of the same specified portion of the holders of the outstanding shares entitled to vote.

Section 200.263 states that each share has one vote unless otherwise provided by the certificate of formation or this Code.

Section 200.264 permits a shareholder to vote by written proxy. A telegram, telex, cablegram, or other form of electronic transmission, including telephonic transmission, or a photographic, photostatic, facsimile or similar reproduction of a writing is considered an execution in writing for this purpose. An electronic transmission must contain or be accompanied by information from which it can be determined that the transmission was authorized.

Section 200.265 specifies that a proxy is not valid after 11 months after execution unless otherwise provided by the proxy.

Section 200.266 provides that proxies are revocable unless the proxy conspicuously states that it is irrevocable and is a proxy coupled with an interest.

Section 200.267 states that an irrevocable proxy is specifically enforceable against successors or transferees of the holder if the proxy is noted conspicuously on the share certificate or the proxy is contained in the notice sent to the holder of uncertificated shares under Section 3.205. Otherwise, the proxy is ineffective against a transfer for value without actual knowledge of the proxy's existence at the time of transfer or against a subsequent transferee, regardless of whether the transfer is for value. The proxy is specifically enforceable against a person who is not a transferee for value from the time the person acquires actual knowledge of the existence of the irrevocable proxy.

Section 200.268 allows a real estate investment trust to establish procedures in its bylaws for determining the validity of proxies and whether shares held of record by nominees are represented at a meeting.

Subchapter G. Trust Managers

Subchapter G contains provisions regarding the trust managers.

Section 200.301 vests in the trust managers the powers necessary or appropriate to effectuate the real estate investment trusts' purposes and to manage the trust estate.

Section 200.302 requires the certificate of formation of the real estate investment trust to contain the name of each trust manager. The selection of a successor trust manager is considered to be an amendment to the certificate of formation.

Section 200.303 requires a trust manager to be an individual but need not be a resident of this state or a shareholder. The certificate of formation or bylaws may prescribe other qualifications for trust managers.

Section 200.304 requires the certificate of formation to set the number constituting the initial trust managers. Thereafter, the certificate of formation or bylaws must set either the number of trust managers or provide for the manner in which the number is determined. Provisions regarding increases or decreases in the number may be contained in the certificate of formation or bylaws.

Section 200.305 entitles trust managers or officers to receive compensation set by or in the manner provided in the certificate of formation or bylaws or as determined by the trust managers, in the absence of such provision.

Section 200.306 states that a trust manager serves until the trust manager's successor is elected and may succeed himself or herself in office.

Section 200.307 allows the board of trust managers to be divided into two or three classes of the same or similar number of trust managers in each class. The terms of office of the trust managers in each class are staggered at successive annual meetings. Other requirements regarding the staggered classes of trust managers are set forth in this section.

Section 200.308 authorizes the remaining trust managers, even if less than a quorum, to fill a vacancy occurring in the office of a trust manager. The certificate of formation or bylaws may provide other procedures for filling vacancies.

Section 200.309 permits regular meetings to be held with or without notice but requires notices for special meetings of trust managers. The notice need not specify the business purpose of the meeting unless required by the bylaws.

Section 200.310 requires the majority of the number of trust managers to constitute a quorum unless the certificate of formation or bylaws requires a greater number.

Section 200.311 authorizes the certificate of formation and bylaws to permit trust managers to establish committees of trust managers. The committees have the authority provided by the resolution designating the committee or the certificate of formation and bylaws. The committee may not have certain powers of the trust managers, although the committee may authorize a distribution or the issuance of shares if authorized in the resolution designating the committee, the certificate of formation or the bylaws.

Section 200.312 makes a trust manager jointly and severally liable to the real estate investment trust for the value of distributed assets which are distributed during the liquidation of the real estate investment trust without payment and discharge or the making of adequate provisions for the payment of all debts and other obligations of the trust. Trust managers who vote for or assent to the making of a loan to another trust manager or officer of the trust or the making of a loan secured by shares of the trust is jointly and severally liable to the trust for the loan amount until the loan is repaid. Trust managers acting in good faith and with ordinary care are excused from liability for distributed assets if they relied on certain information and considered the assets of the trust to be valued at least at book value.

Section 200.313 prohibits actions brought under Section 200.312 against trust managers after the second anniversary of the date of the alleged act giving rise to the liability.

Section 200.314 specifies that a trust manager may not be held liable to the trust for an act, omission, loss, damage or expense arising from the trust manager's duties except for willful misfeasance, willful malfeasance or gross negligence.

Section 200.315 entitles a trust manager to receive contribution from each of the other trust managers who are liable with respect to the claim.

Section 200.316 authorizes an officer to exercise all of the powers of a trust manager unless action by a trust manager is specified by this Code or another applicable law. Delegation of authority to an officer does not relieve a trust manager of responsibility imposed by law.

Section 200.317 provides that contracts or transactions between a real estate

investment trust and an interested manager or officer are valid notwithstanding the trust manager's vote or participation in the meeting at which the contract is authorized if one of several approvals is obtained. The language has been revised to mirror the counterpart language in the for-profit corporation provisions of Title 2. The language also parallels revisions to TBCA Article 2.35-1 effected by the 1997 Texas Legislature to clarify certain ambiguities that had arisen out of recent Delaware case law. These ambiguities are similarly resolved in the revised language of Code Section 200.351.

Subchapter H. Investments

Subchapter H contains provisions relating to investments of the trust estate by trust managers or officers.

Section 200.351 gives the trust managers and officers complete discretion with respect to the investment of the trust estate unless the investment is contrary to this subchapter, the Internal Revenue Code or regulations under the Internal Revenue Code relating to or governing real estate investment trusts.

Subchapter I. Fundamental Business Transactions

Subchapter I contains provisions governing mergers, conversions, share exchanges and sales of all or substantially all of the real estate investment trust's assets.

Section 200.401 contains definitions of the terms shares, voting shares, participating shares and sale of all or substantially all of the assets.

Section 200.402 contains the procedures for approval of a plan of merger by the trust managers and shareholders of the real estate investment trust. Except as provided by this subchapter or Chapter 10, the plan of merger must be submitted to the shareholders for approval.

Section 200.403 specifies the procedures for approval of a plan of conversion by the trust managers and shareholders. The shareholders must approve a plan of conversion.

Section 200.404 specifies the procedures for approval of an interest exchange by the trust managers and shareholders. The plan of exchange must be submitted to shareholders for approval.

Section 200.405 specifies that the sale of all or substantially all of the assets of real estate investment trusts requires the approval of the shareholders. Procedures for approval by the shareholders and trust managers of a sale of all or substantially all the assets of the real estate investment trusts are contained in this section.

Section 200.406 specifies the requirements for a notice to the shareholders of the meeting at which a fundamental business transaction is to be considered. A "fundamental business transaction" is defined in the Code to be a merger, interest exchange, conversion or sale of all or substantially all of the assets of the entity.

Section 200.407 generally requires the vote of the holders of at least two-thirds of the outstanding shares entitled to vote for approval of a fundamental business transaction. The certificate of formation or bylaws may specify a different portion of the shares in accordance with Section 200.261. The affirmative vote of at least two-thirds of the outstanding shares of each class or series of shares entitled to vote on the fundamental business transaction as a class or series is also required.

Section 200.408 states when a separate vote by a class or series of shares is required for approval of a plan of merger, plan of conversion or plan of exchange or sale of all or substantially all of the shares of a real estate investment trust.

Section 200.409 specifies that approval by the shareholders of a real estate investment trust is not required if certain conditions are met, including the number of shares issued by the trust pursuant to the merger does not exceed 20% of the total number outstanding prior to the merger. Mergers effected under Section 10.005 or 10.006 do not require the approval of the shareholders.

Section 200.410 specifies that a shareholder of a domestic real estate investment trust has the rights of dissent and appraisal under Subchapter H, Chapter 10, with respect to a fundamental business transaction.

Subchapter J. Supplemental Winding Up and Termination Provisions

Subchapter J contains supplemental provisions relating to the winding up and termination of a real estate investment trust. The Code omits the unnecessary provision requiring withdrawal of an assumed name certificate found in existing law because the assumed name statute in the Texas Business & Commerce Code would require the same result.

Section 200.451 specifies that a real estate investment trust must approve a voluntary winding up by the affirmative vote of shareholders set forth in Section 200.262.

Section 200.452 specifies that a real estate investment trust may reinstate its existence, cancel an event requiring winding up or revoke a voluntary decision to wind up by the affirmative vote of the shareholders in accordance with Section 200.262.

Section 200.453 provides that the trust managers must manage the winding up of the business or affairs of the real estate investment trust.

Subchapter K. Miscellaneous Provisions

Subchapter K contains miscellaneous provisions relating to real estate investment trusts.

Section 200.501 specifies that a shareholder of record for at least six months or a shareholder of at least 5% of the outstanding shares may examine and copy the books and records of the real estate investment trust. A court may also order production for examination by the shareholder of such books and records.

Section 200.502 provides that shareholders need not join in any sale, lease, mortgage or other disposition of the assets of the real estate investment trust.

Section 200.503 provides that the provisions of this chapter are subject to the provisions of the Internal Revenue Code and the regulations promulgated thereunder with respect to real estate investment trusts who are attempting to qualify as real estate investment trusts under the Internal Revenue Code.

TITLE 6. ASSOCIATIONS

CHAPTER 251. COOPERATIVE ASSOCIATIONS

Subchapter A. General Provisions

Subchapter A contains general provisions relating to definitions, the applicability of nonprofit corporation provisions, and exemptions from this Title. Chapter 251 omits the requirement of existing law that a cooperative association be formed only by specified groups or persons. This requirement in CAA Article 50.01 Section 4 has become outmoded.

Section 251.001 contains definitions for cooperative basis, invested capital, investment dividend, membership capital, net savings, patronage dividend, and savings returns.

Section 251.002 provides that various provisions governing nonprofit corporations apply to cooperative associations.

Section 251.003 exempts various corporations and associations from the provisions of this chapter. This Section clarifies that Chapter 251 does not apply to a corporation or association organized on a cooperative basis under another statute.

Subchapter B. Formation

Subchapter B contains provisions relating to the formation of a cooperative association including holding the organizational meeting, amending the certification of formation, and adopting bylaws.

Section 251.051 requires that a cooperative association hold an organizational meeting after a certificate of formation is filed.

Section 251.052 provides the manner by which the certificate of formation may be amended. This Section omits for cooperative associations the outmoded requirement that the adoption of the amendment must be verified by the officers currently required by the CAA.

Section 251.053 states that the bylaws may be adopted, amended or repealed by majority of the cooperative association's members voting unless the certificate of formation requires a greater majority. This section also sets out the various types of information that the bylaws may contain.

Subchapter C. Management

Subchapter C contains general provisions relating to directors, officers, and referendums.

Section 251.101 states that a cooperative association is generally managed by a board of directors in accordance with Chapter 22. However, the board must contain at least 5 directors who cannot serve for more than 3 years. Additionally, the bylaws may apportion the number of directors among the units and provide for the election of the directors by respective units to which the directors are apportioned.

Section 251.102 provides that the directors must annually elect a president, one or more vice presidents, a secretary and treasurer or a secretary/treasurer.

Section 251.103 states that the certificate of formation and bylaws can set forth the process of officer or director removal. If silent, a director or officer may be removed for cause by a majority vote of the members voting. Vacancies on the board of directors caused by removal are filled in the manner that the bylaws establish for the election of

directors. This Section differs from existing law by authorizing provisions in governing documents permitting the removal of directors.

Section 251.104 provides that the certificate of formation or the bylaws may provide for a referendum on any action requested by at least 10% of the members or by at least a majority of the directors. If a referendum is authorized, the proposition being voted on must be submitted to the members within a specified time. Referendums cannot adversely affect the rights of third parties that have already vested.

Subchapter D. Membership

Subchapter D contains general provisions relating to the eligibility, admission, expulsion, and liability of members.

Section 251.151 states that a person must meet the qualifications for eligibility stated in the certificate of formation or the bylaws prior to becoming a member.

Section 251.152 enables a member to be expelled by the vote of a majority of the members voting at a meeting. The member in question must be given notice of the charges and is entitled to be heard at the meeting. Upon expulsion, the directors must purchase the member's holdings at par value if the purchase does not jeopardize the cooperative association's solvency.

Section 251.153 states that a person is a subscriber of the cooperative association if he is eligible for membership and legally obligated to purchase a share or membership. The certificate of formation or the bylaws may establish conditions under which voting rights or other membership rights are granted.

Section 251.154 limits a member or subscriber's liability for a debt of the cooperative association. However, a subscriber is liable for any unpaid amount on his membership certificate, and a subscriber who assigns his interests is liable with the assignee until the certificates are fully paid.

Subchapter E. Shares

Subchapter E contains general provisions relating to share and membership certificates.

Section 251.201 prevents a cooperative association from issuing certificates until any par value has been paid in full. Additionally, the certificates for membership capital must contain various statements relating to the restrictions on transferability.

Section 251.202 requires a member who withdraws to offer his certificates to the board of directors. The directors have 90 days to purchase the certificates. An investor owning investor's certificates must conform with the guidelines in the association's bylaws governing the conveyance of such certificates. If an investor fails to comply with the bylaws, the cooperative association must repurchase the certificate by paying the investor the par value of the certificates plus all accrued investment dividends.

Section 251.203 enables the bylaws to authorize the board of directors to recall membership certificates of a member who fails to patronize the cooperative association and to reissue or cancel the certificates.

Section 251.204 exempts the minimum amount necessary for membership from attachment, execution, or garnishment for the debts of a member. If a member's holdings are subject to attachment, execution or garnishment, the directors may admit the purchaser to membership or purchase the holdings at par value.

Subchapter F. Meetings and Voting

Subchapter F contains general provisions relating to meetings and voting.

Section 251.251 requires that regular meetings of the members be held at least once a year. Special meetings may be requested by a majority of directors or by at least 1/10th of the membership.

Section 251.252 requires that the notice for special meetings include the purpose of the meeting.

Section 251.253 permits the certificate of formation or bylaws to provide for meetings by units of the membership and for a method of transmitting the votes cast at unit meeting to the central meeting, for the method of representation of the membership by the election of delegates to the central meeting, or for a combination of both methods. Unless the bylaws state otherwise, meetings by a unit are called and held in the same manner as regular meetings. This Section clarifies that a meeting by a unit of the membership must be called and held in the same manner as a regular meeting of the members unless the governing documents provide otherwise.

Section 251.254 states that a member of a cooperative association has one vote unless the cooperative association includes another cooperative association or a group that is organized on a cooperative basis. Any voting agreement that evades the one-member-one-vote rule is not enforceable.

Section 251.255 prevents members from voting by proxy.

Section 251.256 enables the certificate of formation or bylaws to provide for voting by mail.

Section 251.257 states that provisions applying to votes cast by members also applies to votes cast by mail or delegates. However, this section prohibits a delegate from voting by mail.

Subchapter G. Capital and Net Savings.

Subchapter G contains general provisions relating to a cooperative association's net savings.

Section 251.301 provides that an investment dividend of a cooperative association cannot be cumulative and cannot exceed 8% of investment capital unless bylaws state otherwise. Additionally, total investment dividends distributed for a fiscal year cannot exceed 50% of the net savings for that year.

Section 251.302 states that the directors must apportion the net savings in the following order: (1) investment dividends may be paid on investment capital; (2) a portion of the remainder may be allocated to an educational fund, then to the general welfare of the members, and then to retained earnings; and (3) the remainder must be allocated in proportion to individual patronage. The amount of savings returns for subscriber patrons may be distributed to the subscriber or accredited to the subscriber's account until the amount of capital subscribed for has been fully paid.

Subchapter H. Reports and Records.

Subchapter H contains general provisions relating to recordkeeping and reports.

Section 251.351 states that a cooperative association must keep books and records relating to its operations in accordance with standard accounting practices.

Section 251.352 requires that a cooperative association submit a written report to its members at the annual meeting and specifies the information that must be contained in the annual report. Additionally, the directors must appoint a committee composed of

members who are not principal bookkeepers, accountants or employees of the association to review the report of the cooperative association.

Section 251.353 requires that cooperative associations with at least a hundred members or \$20,000 in annual business must no later than, 20 days after the close of business each year, file a report of the association's financial condition stating specific information. This report must include a balance sheet and income and expense statement of the cooperative association. Cooperative associations with at least 300,000 members or \$750,000 in annual business must file a copy of this report with the secretary of state. Persons who verify a report that contains materially false information commit an offense that is punishable by a fine and/or a confinement.

Section 251.354 states that the secretary of state must send written notice within 60 days after the report becomes due to a cooperative association that failed to file. If the cooperative association was required to file at its registered office, the members of the cooperative association may send written notice of the requirement to the cooperative association. If the cooperative association still does not file within 60 days after receiving notice, a member of the cooperative association or the attorney general may seek to compel the filing of the report.

Subchapter I. Winding up and Termination.

Subchapter I contains general provisions relating to the winding up and liquidation of a cooperative association.

Section 251.401 provides that a cooperative association may wind up and liquidate its affairs in accordance with Chapter 11 and Section 22.301. Upon being directed to wind up and liquidate, three members of the cooperative association will be designated as trustees to act on the behalf of the cooperative association to pay debts, liquidate assets, and distribute assets.

Section 251.402 requires that an officer or one of the designated liquidating trustees execute a certificate of termination. This Section clarifies existing law by permitting a person designated as a liquidating trustee to execute the certificate of termination.

Section 251.403 establishes the order in which the cooperative association's assets must be distributed.

Section 251.404 provides for the involuntary termination of a cooperative association in the manner provided by Section 11.251 and states that the assets must be distributed in the same manner established for voluntary termination.

Subchapter J. Miscellaneous Provisions.

Subchapter J contains general provisions relating to exemption from taxes and the use of the name "cooperative."

Section 251.451 exempts a cooperative association from franchise tax and license fees. However, a cooperative association is exempt from the franchise tax imposed by Chapter 171, Tax Code, only if the cooperative association is exempt under that chapter.

Section 251.452 states that only cooperative associations organized under this title, a group organized on a cooperative basis under another law, or a foreign corporation operating under a cooperative basis and authorized to do business in Texas may use the term "cooperative" or any abbreviation of that term. The misuse of this term is a misdemeanor that is punishable by a fine and/or confinement. The attorney general may enjoin one who violates this section. If a court determines that a person who used the term "cooperative" before September 1, 1975, is not organized on a cooperative basis but is authorized to continue to use the term, the business must place after its name the words

"does not comply with the cooperative association law of Texas." This section carves out an exception for The University Cooperative Society associated with the University of Texas.

CHAPTER 252. UNINCORPORATED NONPROFIT ASSOCIATIONS

Section 252.001 defines "member" and "nonprofit association."

Section 252.002 states that principals of law and equity supplement this chapter unless specifically displaced.

Section 252.003 enables a nonprofit association to acquire, hold, encumber, and transfer real and personal property.

Section 252.004 enables a nonprofit association to acquire, hold, encumber, or transfer an estate or interest in real or personal property. Additionally, a nonprofit association may be a beneficiary of a trust, contract, or will.

Section 252.005 enables a nonprofit association to execute and record a statement of authority to transfer an estate or interest in real property. The statement of authority must include the name of the nonprofit association, its address, and the name or title of the person authorized to transfer an estate or interest in real property held in the name of the nonprofit association. It must be executed in the same manner as a deed by a person who is not the person authorized to transfer the estate or interest. Any amendment of the statement of authority must meet the requirements for execution and recording of the original statement.

Section 252.006 establishes that a nonprofit association is a separate legal entity and a person is not liable for a nonprofit association's breach of contract or a tortious act or omission merely because the person is a member or is authorized to participate in the management of the nonprofit association. Tortious acts or omissions of members are not imputed to a person merely because that person is a member or is authorized to participate in the management of the nonprofit association. Members can, however, assert a claim against a nonprofit association and a nonprofit association may assert a claim against members.

Section 252.007 enables a nonprofit association to participate in a judicial, administrative or other governmental proceeding and/or an arbitration, mediation or any other form of alternative dispute resolution. Additionally, a nonprofit association may assert a claim in its own name on behalf of its members if one or more of the members has standing to assert the claim in his own right, the interests that the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member.

Section 252.008 states that a judgment against the nonprofit association is not a judgment against a member.

Section 252.009 grants a person in custody of property of a nonprofit association that has been inactive for at least three years the power to transfer the property to an individual specified in a document of the nonprofit association. If no person is specified, the property should be transferred to a nonprofit association pursuing broadly similar purposes, or to a government or governmental subdivision, agency or instrumentality. If, however, the nonprofit association is operating for a charitable, religious or educational purpose, then any distribution must be made to another nonprofit association or nonprofit corporation with similar purposes.

Section 252.010 requires a nonprofit association to keep books and records and to make them available to the members and the attorney general.

Section 252.011 enables a nonprofit association to file with the secretary of state a statement appointing an agent authorized to receive service of process. The statement and any amendments must be signed by an authorized person of the nonprofit association and by the person appointed as agent. A statement appointing an agent may be canceled by filing written notice of the cancellation containing specific information set forth in this

section.

Section 252.012 prevents a claim for relief against a nonprofit association from being abated based on a change of membership or person authorized to manage the affairs of the nonprofit association.

Section 252.013 requires that any summons and complaint be served on an authorized agent, an officer, managing or general agent, or a person authorized to participate in the management of the affairs of a nonprofit association. The attorney general may request the names, current addresses, and telephone numbers of these individuals.

Section 252.014 states that this chapter must be applied and construed to make this law uniform with respect to the subject of this chapter among the states enacting it.

Section 252.015 states that if, before September 1, 1995, an interest in real or personal property was purportedly transferred to a nonprofit association, but under the law the interest was vested in a fiduciary, the fiduciary may transfer the interest to the nonprofit association in its name or the nonprofit association may require that the interest be transferred to it in its name.

Section 252.016 states that this chapter replaces existing law with respect to matters covered by this chapter but does not affect other law covering unincorporated nonprofit associations.

Section 252.017 states that other portions of the Code do not apply to a nonprofit association, except that Chapters 1 and 4 and, if an agent for service of process is designated, Subchapter E of Chapter 5 do apply.

TITLE 7. PROFESSIONAL ENTITIES

CHAPTER 301. PROVISIONS RELATING TO PROFESSIONAL ENTITIES

Section 301.001 provides that Title 7 applies only to professional entities and foreign professional entities, other than partnerships. Additionally, it specifies that the title does not affect the professional or confidential relationship between the professional and the professional's client. Nor does the title affect the legal remedies afforded a client against a professional for errors, omissions, negligence, incompetence or malfeasance. These provisions are not clear in the TPAA.

Section 301.002 indicates that Title 7 prevails over conflicting provisions in Title 1, 2 or 3.

Section 301.003 sets forth the definitions of terms used in this title. The definitions of professional association and professional corporation have been included in order to more easily distinguish the types of professionals to which those entities apply. A new definition of "licensed mental health professional" is added to more clearly describe those professions that are considered mental health professionals for purposes of Title 7. This Section clarifies that a professional association is limited to practice of certain types of professional services consistent with current legal interpretations and legislative updates.

Section 301.004 sets forth the definition of an "authorized person" for this Title.

Section 301.005 requires a foreign professional entity to register to transact business in Texas by filing an application for registration when required by Chapter 9. Further, the section provides that the secretary of state may only accept an application if the name and the purpose of the entity comply with Title 7 and the chapters of Title 1 applicable to names and purposes. Additionally, the application must state that the jurisdiction of formation of the foreign professional entity permits reciprocal admission of a Texas entity formed under this Code. Under existing law, a foreign professional association and a foreign professional corporation, other than a professional legal corporation, cannot obtain a certificate of authority from the secretary of state to transact business in Texas. In contrast, the provisions of the TLLCA provide a qualification process for a foreign professional limited liability company. Section 301.005 makes Chapter 9 (relating to the registration of foreign entities) applicable to foreign professional entities, thus providing a qualification process otherwise unavailable under existing law to foreign professional corporations and foreign professional associations.

Section 301.006 mandates that a professional association may only provide professional services in Texas through individuals who are licensed to perform the professional service provided by the association. Other professional entities may provide services through authorized persons who render the same professional service as the professional entity. An employee may not provide a professional service unless the individual is licensed to provide the professional service; however, employees who do not, according to general custom or practice, ordinarily provide a professional service do not have to be licensed.

Section 301.007 allows an authorized person to be an owner of a professional entity or governing person of a professional limited liability company and requires that a professional individual be an officer or governing person of a professional association or corporation. Presently, a professional legal corporation may be owned by professional individuals and by professional legal corporations. Ownership in a professional corporation, other than a professional legal corporation, is limited to professional individuals. In contrast, the provisions relating to professional limited liability companies permit ownership by professional entities, as well as professional individuals. Section 301.007, and the definition of "authorized person" found in Section 301.004, in effect open up ownership of professional corporations to professional organizations. Ownership in professional associations, however, remains limited to professional

individuals.

Section 301.008 requires that a managerial official who ceases to be licensed, as required by Section 301.007, must resign the person's position of employment; and an owner who ceases to be licensed must relinquish any ownership interests. Additionally, the section provides that a person who succeeds to an ownership interest must relinquish any financial interest in the entity if the person may not be an owner under Section 301.007. Further, the section requires the professional entity to purchase or cause to be purchased, at a price provided in the governing documents or any applicable agreement, the interest of any person who is required to relinquish the person's financial interest. Section 301.008 also allows a person who is required to relinquish the person's financial interest but who owns all of the outstanding shares to act as a managerial official for the entity for the purpose of winding up the affairs of the entity.

Section 301.009 restricts transfers of ownership interests in a professional entity to an owner, the entity, or an authorized person, and provides for further restrictions to be included in the governing documents.

Section 301.010 provides for joint and several liability of a professional entity and a person or professional organization that commits an error, omission, negligent or incompetent act, or malfeasance when the person or professional organization is an owner, managerial official, employee, or agent of the professional entity and while providing a professional service for the entity during the course of the person's employment.

Section 301.011 exempts the sale, issuance, or offer to sell an ownership interest in a professional entity from state securities laws.

Section 301.012 indicates that persons licensed as doctors of medicine, doctors of osteopathy, or doctors of podiatry may engage in and own a joint practice through a single professional entity. In addition, professionals, other than physicians, engaged in related mental health fields may engage in and own a joint practice through a single professional entity. These are exceptions to existing law that requires a professional entity be formed for the purpose of providing a single professional service. This section does not except the members from the requirement to be licensed to practice the professional service for which the entity is formed and is not intended to allow a member to control the conduct of another member who provides a different type of professional service. State regulatory agencies may continue to regulate these professionals. This Section gives effect to the Texas Medical Practices Act, Tex. Rev. Civ. Stat. Art. 4495(b) Section 5.12 and the Texas Optometry Act, Tex. Rev. Civ. Stat. Art. 4552-5.22, in the joint formation of professional entities by certain professionals.

CHAPTER 302. PROVISIONS RELATING TO PROFESSIONAL ASSOCIATIONS

Section 302.001 makes the provisions of Chapter 20 and 21 governing for-profit corporations applicable to professional associations.

Section 302.002 confirms that a professional association is a separate entity apart from its members and continues until the expiration of the period of duration stated in its certificate of formation or its winding up and termination upon a two-thirds vote of its members or in accordance with its certificate of formation. This existence continues despite specific events occurring with respect to a member, admission of a new member, transfer of an ownership interest or an event requiring a winding up of a partnership.

Section 302.003 allows a professional association to amend its certificate of formation by following the procedures for amendment in Chapter 3 and the procedures in the certificate of formation. Further, the section provides that amendment is not necessary to reflect a change in associates or membership interests.

Section 302.004 permits the members to adopt bylaws for the association or to delegate the adoption to a governing authority.

Section 302.005 provides that a professional association shall be governed by a board of directors or executive committee, who are elected by its members.

Section 302.006 specifies that each member shall have the voting rights specified in the certificate of formation.

Section 302.007 requires a professional association to elect officers.

Section 302.008 restricts eligibility of officers and governing persons to members of the professional association, but does not require an officer to be a governing person.

Section 302.009 allows the officers of a professional association to employ agents or employees as desirable.

Section 302.010 specifies that a member of a professional association does not, merely by virtue of being a member, have the authority to bind the association.

Section 302.011 provides that the profits of the association shall be divided as provided in the governing documents.

Section 302.012 requires a professional association to file an annual report with the Secretary of State and specifies the contents of the statement.

Section 302.013 outlines the circumstances under which a professional association shall wind up and terminate, and specifies the persons who may execute the certificate of termination.

CHAPTER 303. PROVISIONS RELATING TO PROFESSIONAL CORPORATIONS

Section 303.001 makes the provisions of Chapter 20 and 21 governing for-profit corporations applicable to professional corporations.

Section 303.002 clarifies that a shareholder of a corporation is not required to supervise the performance of duties by an officer or employee of the corporation, and is subject to no greater liability than a shareholder of a for-profit corporation.

Section 303.003 imposes a requirement that any restriction on transfer of shares of a professional corporation be noted on each share certificate and incorporated by reference as provided by Chapter 21.

Section 303.004 gives a professional corporation the power to redeem the shares of a shareholder at the price agreed upon or specified in the governing documents or an applicable agreement.

Section 303.005 specifies that the existence of a professional corporation continues in spite of the death, incompetence, resignation, withdrawal, retirement or expulsion of any shareholder; the transfer of shares to a new shareholder; or the occurrence of an event requiring the winding up of a partnership. Such existence continues until winding up and termination is concluded.

Section 303.006 specifies that a shareholder may not wind up the affairs and terminate the corporation independently of the other shareholders of the professional corporation.

CHAPTER 304. PROVISIONS RELATING TO PROFESSIONAL
LIMITED LIABILITY COMPANIES

Section 304.001 makes the provisions of Title 3 applicable to professional limited liability companies.

TITLE 8. MISCELLANEOUS AND TRANSITION PROVISIONS

CHAPTER 401. GENERAL PROVISIONS

Section 401.001 sets forth definitions of "mandatory application date" and "prior law." "Mandatory application date" means for an entity subject to the Code under section 402.001, the date of formation or registration of the entity, for an entity subject to the Code under section 402.003 or 402.004, the date of filing of documentation necessary to adopt the Code, and for any other entity, January 1, 2010. The term "prior law" means the applicable law in effect before January 1, 2006.

CHAPTER 402. MISCELLANEOUS AND TRANSITION PROVISIONS

Section 402.001 provides that the Code applies to a domestic entity formed on or after the effective date of the Code, and a foreign filing entity that is transacting business in this state and is not registered before the effective date of the Code. Any entity may elect, as provided by Section 402.003 or 402.004, to be governed by the Code. Additionally, on or after the effective date of the Code, the fees required by Chapter 4 apply to all filings made with the Secretary of State, including comparable filings under prior law, regardless whether the entity has adopted the Code.

Section 402.003 provides that a domestic entity formed before the effective date of the Code may voluntarily elect to adopt and become subject to the Code by complying with the procedures to amend its governing documents, amending the governing documents and, if the domestic entity is a filing entity, filing with the Secretary of State in accordance with Chapter 4 a certificate of amendment to its formation or restated certificate of formation that specifically states that the filing entity is electing to adopt the Code and would cause its certificate of formation or restated certificate of formation to comply with the Code. If the amendment to the governing documents of the domestic entity that are necessary to conform the governing documents to the Code would not require, or the prior law, the vote or consent of the owners or members of the entity, this code and any required amendment to the governing documents may be adopted by the governing authority only in the manner provided for an amendment of the particular governing document.

Section 402.004 sets forth the rule with respect to foreign entities registered with the Secretary of State who may voluntarily elect to adopt and become subject to the Code by filing with the Secretary of State an amendment to its application for registration with respect to the adoption by the foreign entity of the Code.

Section 402.005 provides that on January 1, 2010, if a domestic entity formed before the effective date of this Code (or a foreign filing entity registered with the Secretary of State to transact business before the effective date of the Code) has not taken the action specified by Sections 402.003 or 402.004 to elect to adopt the Code, then the new law applies on or after the mandatory application date to such entities and the entity is not considered to have failed to comply with the Code if the entity's certificate of formation does not comply with the Code.

Section 402.006 provides, in Subsection (a), that except as otherwise expressly provided by Title 8, all of the provisions of the Code govern acts, contracts, or other transactions by an entity subject to the Code or its governing authority, officers, owners or members that occur on or after the mandatory application date. Prior law governs acts, contracts or transactions that occur before the mandatory application date. Subsection (b) grandfathers existing ownership interest certificates of partnerships under existing law but requires all new ownership interest certificates of partnerships to satisfy the requirements of the Code.

Section 402.007 provides that Chapter 8 governs any proposed indemnification by a domestic entity after the mandatory application date, regardless of whether the events on which the indemnification is based occurred before or after the mandatory application date.

Section 402.008 provides that Chapter 6 and any other applicable provision of this Code should apply to meetings of owners or members held on or after the mandatory application date or action undertaken by owners or members under a written consent that takes effect on or after the mandatory application date. Prior law applies to a meeting of owners or members and to any vote cast at a meeting if the meeting was initially called for a date before the mandatory application date and notice of the meeting was given to owners or member entitled to vote at the meeting.

Section 402.009 provides that Chapter 6 and other applicable provisions of the

Code apply to a meeting of the governing authority or a committee of the governing authority held on or after the mandatory application date and action undertaken by the governing authority or committee thereof under written consent that takes effect on or after the mandatory application date. Prior law applies to meetings of the governing authority or committee thereof and any vote cast at a meeting if the meeting was initially called for a date before the mandatory application date and notice of the meeting was given to governing persons entitled to vote at the meeting.

Section 402.010 provides that Chapter 10 and other applicable provisions of the Code apply to a transaction consummated after the mandatory application date, except that if a required approval of the outstanding ownership interest has been given before the mandatory application date or has been given after the mandatory application date at a meeting of owners or members initially called for a date before the mandatory application date, the transaction will be governed by the prior law.

Section 402.011 provides that Chapter 11 applies to actions for involuntary or judicial winding up and termination of an entity commenced after the mandatory application date or voluntary winding up and termination proceeding initiated in respect of an entity governed by the Code. The prior law governs an action for involuntary or judicial winding that is pending on the mandatory application date or a proceeding for voluntary winding up and termination initiated before the mandatory application date.

Section 402.012 provides that a foreign entity that has transacted intrastate business in Texas before the mandatory application date and that is required by Chapter 9 to register to transact business is not subject to a direct or indirect penalty as a result of failure to register under Chapter 9 if the application for registration is filed not later than the 30th day after the mandatory application date.

Section 402.013 provides that if the rights, privileges and powers of a domestic filing entity had been suspended, and are still suspended immediately before the mandatory application date under prior law, the Code applies to the entity on the mandatory application date. If the rights, privileges and powers of a domestic filing entity have been suspended and are still suspended under the Tax Code immediately before the mandatory application date, the suspension continues to apply to the corporation or other entity until the rights, privileges and powers are restored under the Secretary of State under the Tax Code.

Section 402.014 states that except as expressly provided by Title 8, the Code does not apply to an action or proceeding commenced before the mandatory application date. Prior law applies to the action or proceeding.

Section 2. Conforming amendment to Part Eleven, Texas Business Corporation Act, by adding Article 11.02 relating to the applicability of the Code and the expiration of the TBCA.

Section 3. Conforming amendment to Part Seven, Texas Miscellaneous Corporation Laws Act relating to the applicability of the Code and the expiration of the TMCLA.

Section 4. Conforming amendment to the Texas Non-Profit Corporation Act adding Article 11.02 that relates to the applicability of the Code and expiration of the TNPCA.

Section 5. Conforming amendment to the Cooperative Association Act adding Section 47 relating to the applicability of the Code and expiration of the CAA.

Section 6. Confirming amendment to the Texas Uniform Unincorporated Nonprofit Association Act, adding Section 19 relating to the applicability of the Code and expiration of the TUUNAA.

Section 7. Conforming amendment to the Texas Professional Corporation Act adding Section 21 relating to the applicability of the Code and expiration of the TPCA.

Section 8. Conforming amendment to the Texas Professional Association Act adding Section 27 relating to the applicability of the Code and expiration of the TPAA.

Section 9. Conforming amendment to Part Eight, Texas Limited Liability Company Act adding Article 8.13 relating to the applicability of the Code and expiration of the TLLCA.

Section 10. Conforming amendment to Article Thirteen, Texas Revised Limited Partnership Act adding Section 13.10 relating to the applicability of the Code and expiration of the TRLPA.

Section 11. Conforming amendment to Article XI, Texas Revised Partnership Act adding Section 11.05 relating to the applicability of the Code and expiration of the TRPA.

Section 12. Conforming amendment to the Texas Real Estate Investment Trust Act adding Section 29.10 relating to the applicability of the Code and expiration of the TREITA.

Section 13. Conforming amendment to Article 1399, Revised Statutes, relating to the applicability of Articles 1399-1407, Revised Statutes to a grand body to which this Code applies.

Section 14. Conforming amendment to Article 1407a, Revised Statutes adding new Section 9 relating to the applicability of Article 1407a to a church benefits board to which this Code applies.

Section 15. Conforming amendment to Article 1528g, Revised Statutes, relating to the applicability of Article 1528g to a business development corporation to which this Code applies.

Section 16. Repeals outdated or ineffective statutes or statutes that are replaced by the Code.

Section 17. States that the effective date of the Code is January 1, 2006.