

## **BILL ANALYSIS**

HB 1165

By: Solomons

House Committee on Business & Industry  
Committee Report ( Substituted)

### **BACKGROUND AND PURPOSE**

Neither the Texas Business Corporation Act (the “TBCA”) nor the Texas Miscellaneous Corporation Laws Act (the “TMCLA”) has been substantively amended since 1997. During that time, changes in technology and corporate law have arisen that necessitate amendment of those statutes. HB 1165 amends the Acts to allow for the statute to more closely align with modern technology and business practices.

### **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.

### **ANALYSIS**

#### **ARTICLE 1. TBCA AMENDMENTS**

Amends Article 1.02A to add a definition of “Electronic Transmission”. Since the last amendments to the TBCA, corporations have made increased use of e-mail and the internet in their businesses. Several of the amendments in this bill provide for the use of electronic transmissions in granting proxies, conducting shareholder meetings, etc.

Amends Article 2.02A(20) to allow a corporation to renounce any interest in business opportunities presented to the corporation or one or more of its officers, directors or shareholders. This amendment is consistent with similar provisions adopted in other jurisdictions.

Amends Article 2.02-1F, K, O to clarify the procedures for indemnification approval; provide a distinction between current and former directors for reimbursement of expenses; and provide that indemnification approval need not follow required procedure for employees or agents.

Amends Article 2.09A(2) to clarify that a registered agent can be any entity organized under or authorized to transact business in the state, and requires that such entity be open during normal business hours to accept service of process. The existing law only allows corporations to serve as registered agents. With the increased utilization of other business entities, such as limited liability companies, there is no reason to require that registered agents be corporations.

Amends Article 2.13E, F, G to clarify that the board may unilaterally amend the terms of, or delete, an unissued series of shares. This allows directors to amend in a direct, simple manner the terms of a series of stock established by board resolution if no shares of that series are outstanding. Under the existing law, the board can effect the same thing but only through the two-step process of canceling the designation of the series and adopting a designation of a new series containing the amended terms.

Amends Article 2.14C, D, E to update the procedures for subscriptions for shares. The current subscription provisions of TBCA Art. 2.14 are antiquated and are rarely invoked. The revisions contain provisions that modernize the law relating to subscriptions and are based primarily on the subscription provisions of the Model Business Corporation Act. 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. The current law requires the shares to be paid in full before they can be issued. The amendment allows installment payments and allows the corporation to keep any part of the subscription already paid upon a

forfeiture for failure of a subscriber to pay an installment or called subscription when due. The amendments also add 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.

Amends Article 2.14-1B, C, E, F to validate 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. The provisions also allow for officers to designate option recipients if so provided in the plan or under the terms of options.

Amends Article 2.22B, D(6), H to clarify that restrictions on ownership and transfer imposed for tax purposes are reasonable. This does not represent a change of the law but merely a clarification of existing law.

Amends Article 2.22-1 to clarify matters related to preemptive rights; provides that preemptive rights do not exist unless expressly provided for in the Articles of Incorporation. Texas corporate law currently provides shareholders with the preemptive right to purchase their pro rata share of any newly issued stock. This right may be eliminated by provisions in the corporation's articles of incorporation. As a routine matter, most practitioners deny preemptive rights in all new Texas corporations they form. The amendments provide that with respect to corporations formed after the effective date of the Code that shareholders may have preemptive but only if the rights are set forth in the articles of incorporation. This change is consistent with developments in modern corporate law and is intended to make Texas law consistent with Delaware law and the Revised Model Business Corporation Act. Special grandfathering rules are added to preserve shareholders' preemptive rights in existing corporations.

Amends Article 2.24A, B to provide for electronic meetings of shareholders. This amendment recognizes the continuing advancements in electronic communications technology and explicitly authorizes use of other suitable electronic communications systems including video conferencing or the Internet. This approach is consistent with recent amendments made to the Delaware corporation law permitting the use of new technologies to conduct shareholder meetings entirely by remote communication. The amendment requires that a verification system be established to identify that the appropriate persons are voting at the meeting and to permit record keeping.

Amends Article 2.25A, C to provide the mechanics for providing notice of electronic meetings consistent with the changes to Article 2.24

Amends Article 2.27A, C to allow shareholder lists to be maintained electronically. This amendment recognizes the continuing advancements in electronic communications technology and explicitly authorizes corporations to maintain shareholder lists in electronic format. The corporation is required to take reasonable steps to ensure that all information is available only to shareholders of the corporation.

Amends Article 2.29C, D to provide for electronic voting and denies cumulative voting unless expressly provided in the Articles of Incorporation. In keeping with the goal of modernization of the law and authorization of use of electronic technologies, this amendment authorizes electronic proxies, including telephonic proxies. An electronic transmission must contain or be accompanied by information from which it can be determined that the transmission was authorized by the shareholder. Delaware and most other states that permit electronic proxies have similar provisions requiring or facilitating verification. Texas corporate law currently provides shareholders with the right to cumulate their votes in the election of directors. This right may be eliminated by provisions in the corporation's articles of incorporation. As a routine matter, most practitioners deny cumulative voting rights in all new Texas corporations they form. The amended law provides with respect to corporations formed after the effective date of the amendment that shareholders may have cumulative voting rights but only if the rights are set forth in the certificate of formation. This change is consistent with developments in modern corporate law and is intended to make

Texas law consistent with Delaware law and the Revised Model Business Corporation Act. Special grandfathering rules are added to preserve shareholders' cumulative voting rights in existing corporations.

Amends Article 2.32A, B, C, D to provide for the right of a director to resign in writing or by electronic transmission. In keeping with the goal of modernization of the law and authorization of the use of electronic technologies, this amendment provides that a director may resign by the use of electronic transmission. This amendment is not intended, however, to have any effect on a director's fiduciary, contractual or other duties with respect to resignations.

Amends Article 2.36A to provide that committees may be appointed by a majority of directors present at a meeting, as opposed to a majority of the full board. The former standard was deemed to be stringent and inconsistent with modern corporate law. However, the right to appoint committees must still be granted by either the articles of incorporation or bylaws.

Amends Article 2.41A(2) to eliminate liability for commencing business before consideration of \$1,000 is received, consistent with the changes made to Article 3.05A.

Amends Article 2.44A to clarify that books, records, minutes and share transfer records must be convertible into written paper form.

Amends Article 3.02A(7) to eliminate the statement in the Articles of Incorporation that the corporation will not commence business until it receives consideration of \$1,000, consistent with the changes made to Article 3.05A.

Amends Article 4.01A to add the concepts of "subdivision" and "combination" to the list of actions that may be included in an amendment to the articles of incorporation.

Amends Article 4.02A(1), (4) to clarify that amendments adopted by the board as provided by Article 2.13 do not have to be submitted to shareholders. The amendment also provides that the board may, if so authorized in the adopting resolution, withdraw a proposed amendment notwithstanding shareholder approval.

Amends Article 4.04B(4), (5), (6), (7) to eliminate certain required items from the articles of amendment. The eliminated items include information about the shares eligible to be voted on the amendment, the number of shares voted in favor of the amendment, the effect on stated capital and the manner of effecting any share exchange, reclassification or cancellation. These items were the primary reasons that caused the Secretary of State of Texas to reject articles of amendment. Since the information is regarded as unnecessary, for administrative convenience these items have been eliminated.

Amends Article 4.10A, D to eliminate the statement of cancellation of shares upon redemption as a result of the diminished importance of stated capital under modern corporate laws. Modern corporate laws have generally eliminated public filings relating to the redemption of shares or changes in stated capital or treasury shares.

Amends Article 4.11A, D to eliminate the required filing of a statement of cancellation of treasury shares.

Amends Article 4.12D to eliminate the required filing of a statement of reduction of stated capital.

Amends Article 5.01C(3) to provide that a plan of merger may include a provision that the plan be submitted to shareholders even if the board deems that the plan is not advisable. This addition expressly allows an action that is believed to be tacitly allowed by the existing law and reflects changes made in Delaware law.

Amends Article 5.02C to provide that a plan of exchange may include a provision that the plan be submitted to shareholders even if the board deems that the plan is not advisable. This addition expressly

allows an action that is believed to be tacitly allowed by the existing law and reflects changes made in Delaware law.

Amends Article 5.03B(1), H(4), (6) to allow a board to submit a plan of merger with a recommendation that shareholders not approve it and adds provisions for merging different forms of entities. This addition expressly allows an action that is believed to be tacitly allowed by the existing law and reflects changes made in Delaware law. Also, the existing law does not contemplate the effect on organizational documents of a merger of different forms of entities. The amendment clarifies the procedure for such a merger.

Amends Article 5.06A(7) to correct a technical error in the statute in that rights of holders in a merger will be contained in a plan of merger, not the articles of merger.

Amends Article 5.11B(1), (3)(a) to clarify that holders of depository receipts held in respect of shares have the same rights of dissent as holders of the underlying shares. This reflects the modern practice of holding depository receipts in lieu of holding shares themselves.

Amends Article 5.16 to make technical clarifications with respect to subsidiary mergers.

Amends Article 6.04A(3) to provide that the directors have responsibility for winding up a corporation. The existing law did not address this issue so the amendment is necessary to clarify where the responsibility lies.

Amends Article 8.05A(8), (9), (10), (11) to eliminate certain superfluous items to be included in a certificate for authority to conduct business by a foreign corporation.

Amends Article 8.06A to eliminate the requirement of a certificate of existence or similar certificate from a foreign jurisdiction. This requirement was deemed to be of little value and overly burdensome to foreign corporations.

Amends Article 9.09 to provide for waivers of notice by electronic transmissions. This amendment recognizes the continuing advancements in electronic communications technology and explicitly authorizes persons to waive notice by electronic transmission as well as in writing by allowing shareholders and directors to act by consent by electronic transmission.

Amends Article 9.10A, B to provide for consents by electronic transmissions. This amendment recognizes the continuing advancements in electronic communications technology and explicitly authorizes persons to waive notice by electronic transmission as well as in writing by allowing shareholders and directors to act by consent by electronic transmission. This amendment requires that the corporation be able to verify (a) that the electronic transmission was transmitted by the shareholder or director, and (b) the date of the transmission.

Amends Article 9.14A to clarify that the TBCA is applicable to domestic and foreign for-profit corporations, regardless of whether the foreign corporation is actually registered to transact business in Texas.

Amends Article 13.02A(4), (6)(ii) to make a technical correction that changes the term “common stock” to “voting shares” to include any preferred stock that might have voting rights.

Amends Article 13.07B to clarify that matters submitted to votes under Part 13 of the TBCA may be increased, but not decreased, under Article 2.28 of the TBCA.

## ARTICLE 2. TBCA DELETIONS; TMCLA DELETIONS

Amends Article 2.14 of the TBCA to delete Section B as part of the update of the subscription procedures. Amends Article 3.05A to delete the requirement that a corporation receive \$1,000 before commencing business. The \$1,000 requirement is an antiquated concept that is no longer in use in modern corporate

law. This change makes Texas law consistent with Delaware law and the Revised Model Business Corporation Act. Amends Article 4.10B, C to eliminate the statement of cancellation of shares upon redemption as a result of the diminished importance of stated capital under modern corporate laws. Modern corporate laws have generally eliminated public filings relating to the redemption of shares or changes in stated capital or treasury shares. Amends Article 4.11B, C to eliminate the required filing of a statement of cancellation of treasury shares. Amends Article 4.12B, C to eliminate the required filing of a statement of reduction of stated capital. Amends Articles 1302-2.01 (Married Women), 1302-2.02 (Notice by Firm), 1302-2.03 (Ostensible Corporation; Debt), 1302-2.04 (Construction of Provision as to Exclusive Right of Trustee to Sue), 1302-2.09 (Authority of Domestic and Foreign Corporations to Borrow Money), 1302-2.09A (Alternative Rate), 1302-2.10 (Domestic or Foreign Corporations Discounting With Federal Intermediate Credit Bank; Interest Rate), 1302-3.02 (Educational Corporations) and 1302-3.03 (Cemeteries), all of which were determined to be antiquated and no longer necessary.

### **EFFECTIVE DATE**

September 1, 2003

### **COMPARISON OF ORIGINAL TO SUBSTITUTE**

C.S.H.B. 1165 differs from the original in mostly grammatical differences. Changes are as follows:

- Art. 2.14-1 (F) Clarifies that the Board of Directors has the ability to authorize officers of the corporation to perform one or both of the options listed in Art. 2.14-1 (F) (1-2). This is mostly a grammatical clarification.
- Art. 2.22(D)(7) Adds language “or results in.” This clarifies what actions are covered under this subsection.
- Art. 2.22 (H)(1) Changes the word “stockholder” to “shareholder.” This is a grammatical conforming amendment.
- Art. 2.25 (A) Adds language “by electronic transmission.” Gives a corporation the right to use electronic means to communicate. Restrictions for the electronic transmission is already in the bill, but this specifically gives them the permission to utilize these methods.
- Art. 5.03 Deletes changes to subsection (A). This language was repetitive of the intent of the language in subsection (C), and was thus unnecessary.
- Art. 5.03 (H) (6) Changes language from “bylaws” to “corresponding documents” as not all organizations have bylaws.