

By: Goolsby

H.B. No. 2578

A BILL TO BE ENTITLED

AN ACT

relating to corporations; notice and voting by electronic means.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 1.02, Texas Business Corporation Act is amended to read as follows:

Art. 1.02. Definitions

A. As used in this Act, unless the context otherwise requires, the term:

(1) "Articles of incorporation" means the original or restated articles of incorporation and all amendments thereto.

(2) "Associate," when used to indicate a relationship with a person, means:

(a) a domestic or foreign corporation or other entity of which the person is an officer or partner or is the beneficial owner of 10 percent or more of a class of voting shares or similar securities of that corporation or other entity;

(b) a trust or estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar fiduciary capacity; or

(c) a spouse of the person or a relative of the person, or of the person's spouse, who has the same home as the person or who is a director or officer of such person or any of its affiliates.

(3) "Authorized shares" means the shares of all

1 classes which the corporation is authorized to issue.

2 (4) "Cancel" means to restored issued shares to the
3 status of authorized but unissued shares.

4 (5) "Certificated shares" means shares represented by
5 instruments in bearer or registered form.

6 (6) "Conspicuous" or "conspicuously," when prescribed
7 for information appearing on a certificate for shares or other
8 securities, means the location of such information or use of type of
9 sufficient size, color, or character that a reasonable person
10 against whom such information may operate should notice it. For
11 example, a printed or typed statement in capitals, or boldface or
12 underlined type, or in type that is larger than or that contrasts in
13 color with that used for other statements on the same certificate,
14 is "conspicuous."

15 (7) "Consuming assets corporation" means a
16 corporation which is engaged in the business of exploiting assets
17 subject to depletion or amortization and which elects to state in
18 its articles of incorporation that it is a consuming assets
19 corporation and includes as a part of its official corporate name
20 the phrase "a consuming assets corporation," giving such phrase
21 equal prominence with the rest of the corporate name on its
22 financial statements and certificates representing shares. All its
23 certificates representing shares shall also contain a further
24 sentence: "This corporation is permitted by law to pay dividends
25 out of reserves which may impair its stated capital."

26 (8) "Conversion" means:

27 (a) the continuance of a domestic corporation as,

1 and in the organizational form of, a foreign corporation or other
2 entity; or

3 (b) the continuance of a foreign corporation or
4 other entity as, and in the organizational form of, a domestic
5 corporation.

6 (9) "Converted entity" means any domestic or foreign
7 corporation or other entity to which a converting entity has
8 converted or intends to convert as permitted by Article 5.17 of this
9 Act.

10 (10) "Converting entity" means any domestic or foreign
11 corporation or other entity that has converted or intends to
12 convert as permitted by Article 5.17 of this Act.

13 (11) "Corporation" or "domestic corporation" means a
14 corporation for profit subject to the provisions of this Act,
15 except a foreign corporation.

16 (12) "Disinterested," when used to indicate a director
17 or other person is disinterested in a contract, transaction, or
18 other matter for purposes of approval of a contract or transaction
19 under Article 2.35-1 of this Act and for purposes of considering the
20 disposition of a claim or challenge with respect to a particular
21 contract or transaction or to particular conduct means the director
22 or other person, or an associate of the director (other than the
23 corporation and its associates) or other person, is not a party to
24 the contract or transaction or is not materially involved in the
25 conduct that is subject to the claim or challenge and does not
26 otherwise have a material financial interest in the outcome of the
27 contract or transaction or the disposition of the claim or

1 challenge. A director or other person is not to be considered to be
2 materially involved in conduct that is subject to a claim or
3 challenge or to otherwise have a material financial interest in the
4 outcome of a contract or transaction or the disposition of the claim
5 or challenge solely by reason of the existence of one or more of the
6 following circumstances:

7 (a) the person was nominated or elected as a
8 director by persons who are interested in the contract or
9 transaction or who are alleged to have engaged in the conduct that
10 is subject to the claim or challenge;

11 (b) the person receives normal director's fees or
12 similar customary compensation, expense reimbursement, and
13 benefits as a director of the corporation;

14 (c) the person has a direct or indirect equity
15 interest in corporation;

16 (d) the corporation or its subsidiaries has an
17 interest in the contract or transaction or was affected by the
18 alleged conduct;

19 (e) the person or an associate or affiliate of
20 the person receives ordinary and reasonable compensation for
21 services rendered to review, make recommendation, or decided on the
22 disposition of the claim or challenge; or

23 (f) in the case of a review by the person of
24 alleged conduct that is subject to a claim or challenge:

25 (i) the person is named as a defendant in
26 the derivative proceeding with respect to such matter or as a person
27 who engaged in the alleged conduct; or

1 (ii) the person approved of, voted for, or
2 acquiesced in, as a director, the act being challenged if the act
3 resulted in no material personal or financial benefit to the person
4 and the challenging party fails to allege with particularity facts
5 that, if true, raise a significant prospect that the director would
6 be adjudged liable to the corporation or its shareholders by reason
7 of that conduct.

8 (13) "Distribution" means a transfer of money or other
9 property (except its own shares or rights to acquire its own
10 shares), or issuance of indebtedness, by a corporation to its
11 shareholders in the form of:

12 (a) a dividend on any class or series of the
13 corporation's outstanding shares;

14 (b) a purchase, redemption, or other acquisition
15 by the corporation, directly or indirectly, of any of its own
16 shares; or

17 (c) a payment by the corporation in liquidation
18 of all or a portion of its assets.

19 (14) "Electronic transmission" means any form of
20 communication, not directly involving transmission of paper, that
21 creates a record that may be retained, retrieved and reviewed by a
22 recipient thereof, and that may be directly reproduced in paper
23 form by such a recipient through an automated process. For purposes
24 of Arts. 2.26-1 and 2.37 of this Act, a written consent and the
25 signing thereof may be accomplished by one or more electronic
26 transmissions.

27 (15) "Foreign corporation" means a corporation for

1 profit organized under laws other than the laws of this State.

2 (16) "Independent," when used to indicate a director
3 or other person is independent for purposes of considering the
4 disposition of a claim or challenge with respect to a particular
5 contract or transaction or to particular conduct or alleged conduct
6 means:

7 (a) the director or other person is
8 disinterested;

9 (b) the director or other person is not an
10 associate (other than by reason of being a director of the
11 corporation or one more of its subsidiaries or associates) or
12 member of the immediate family of a party to the contract or
13 transaction that is the subject of the claim or challenge or that is
14 alleged to have engaged in the conduct that is subject to the claim
15 or challenge;

16 (c) the director or other person, or an associate
17 or member of the immediate family of the director or other person,
18 does not have a business, financial, or familial relationship with
19 a party to the contract or transaction that is the subject of the
20 claim or challenge or that is alleged to have engaged in conduct
21 that is subject to the claim or challenge, which, in each case,
22 could reasonably be expected to materially and adversely affect the
23 director's or other person's judgment with respect to the
24 consideration of the disposition of the matter subject to the claim
25 or challenge in the interests of the corporation; and

26 (d) the director or other person is not otherwise
27 shown, by a preponderance of the evidence by the person challenging

1 the independence of the director or other person, to be under the
2 controlling influence of a party to the contract or transaction
3 that is the subject of the claim or challenge or that is alleged to
4 have engaged in conduct that is subject to the claim or challenge.

5 A director or other person is not considered to have a
6 relationship that could be expected to materially and adversely
7 affect the director's or other person's judgment with respect to the
8 consideration of the disposition of a matter subject to a claim or
9 challenge or to otherwise be under the controlling influence of a
10 party to a contract or transaction that is the subject of the claim
11 or challenge or that is alleged to have engaged in conduct that is
12 subject to the claim or challenge solely by reason of the existence
13 of one or more of the following circumstances:

14 (a) the person has been nominated or elected as a
15 director by persons who are interested in the contract or
16 transaction or who are alleged to have engaged in the conduct that
17 is subject to the claim or challenge;

18 (b) the person receives normal director's fees or
19 similar customary compensation, expense reimbursement, and
20 benefits as a director of the corporation;

21 (c) the person has direct or indirect equity
22 interest in the corporation;

23 (d) the corporation or its subsidiaries have an
24 interest in the contract or transaction or were affected by the
25 alleged conduct;

26 (e) the person or an associate or affiliate of
27 such person receives ordinary and reasonable compensation for

1 services rendered to review, make recommendations, or decide on the
2 disposition of the claim or challenge; or

3 (f) the person or an associate (other than the
4 corporation and its associates), immediate family, member or
5 affiliate of the person has an ongoing business relationship with
6 the corporation that is not material to that person, associate,
7 family member, or affiliate.

8 (17) "Insolvency" means inability of a corporation to
9 pay its debts as they become due in the usual course of its
10 business.

11 (18) "Investment Company Act" means the Investment
12 Company act of 1940 (15 U.S.C. Sec. 80a-1 et seq.);

13 (19) "Merger" means (a) the division of a domestic
14 corporation into two or more new domestic corporations or into a
15 surviving corporation and one or more new or foreign corporations
16 or other entities, or (b) the combination of one or more domestic
17 corporations with one or more domestic or foreign corporations or
18 other entities resulting (i) one or more surviving domestic or
19 foreign corporations or other entities (ii) the creation of one or
20 more new domestic or foreign corporations or other entities, or
21 (iii) one or more surviving domestic or foreign corporations or
22 other entities and the creation of one or more new domestic or
23 foreign corporations or other entities.

24 (20) "Net assets" means the amount by which the total
25 assets of a corporation exceed the total debts of the corporation.

26 (21) "Other entity" means any entity, whether
27 organized for profit or not, that is a corporation (other than a

1 domestic or foreign corporation), limited or general partnership,
2 limited liability company, real estate investment trust, joint
3 venture, joint stock company, cooperative, association, bank,
4 trust, insurance company or other legal entity organized pursuant
5 to the laws of this state or any other state; or

6 (22) "Share dividend" means a dividend by a
7 corporation that is payable in its own authorized but unissued
8 shares or in treasury shares. An amendment to a corporation's
9 articles of incorporation to change the shares of any class or
10 series, whether with or without par value, into the same or a
11 different number of shares, either with or without par value, of the
12 same class or series or another class or series does not constitute
13 a share dividend.

14 (23) "Shareholder" or "holder of shares" means the
15 person in whose name shares issued by a corporation are registered
16 at the relevant time in the share transfer records maintained by the
17 corporation pursuant to Article 2.44 of this Act.

18 (24) "Shares" mean the units into which the
19 proprietary interests in a corporation are divided, whether
20 certificated or uncertificated shares.

21 (25) "Stated capital" means, at any particular time,
22 the sum of:

23 (a) the par value of all shares of the
24 corporation having a par value that have issued;

25 (b) the consideration fixed by the corporation in
26 the manner provided by Article 2.15 of this Act for all shares of
27 the corporation without par value that have been issued, except

1 such part of the consideration that is actually received therefor
2 (which part must be less than all of that consideration) that the
3 board by resolution adopted no later than sixty (60) days after the
4 issuance of those shares may have allocated to surplus; and

5 (c) such amounts not included in paragraphs (a)
6 and (b) of this subsection as have been transferred to stated
7 capital of the corporation, whether upon the payment of a share
8 dividend or upon adoption by the board of directors of a resolution
9 directing that all or part of surplus be transferred to stated
10 capital, minus all reductions from such sum as have been effected in
11 a manner permitted by law.

12 (26) "Subscriber" means the offeror in a subscription.

13 (27) "Subscription" means a memorandum in writing,
14 executed before or after incorporation, wherein an offer is made to
15 purchase and pay for a specified number of theretofore unissued
16 shares of a corporation.

17 (28) "Surplus" means the excess of the net assets of a
18 corporation over its stated capital.

19 (29) "Treasury shares" means shares of a corporation
20 which have been issued, have been subsequently acquired by and
21 belong to the corporation, and have not been canceled and restored
22 to the status of authorized but unissued shares. Treasury shares do
23 not include shares held by a corporation, either directly or
24 through a trust or similar arrangement, in a fiduciary capacity.
25 Treasury shares shall be deemed to be "issued" shares but not
26 "outstanding" shares and shall not be included in the total assets
27 of a corporation for purposes of determining its "net assets."

1 (30) "Uncertificated shares" means shares not
2 represented by instruments and the transfers of which are
3 registered upon books maintained for that purpose by or on behalf of
4 the issuing corporation.

5 B. Part Twelve of this Act provides definitions of terms
6 used in the Texas Close Corporation Law.

7 C. A reference in this Act to another statute is a reference
8 to that statute as amended.

9 SECTION 2. Article 2.24, Texas Business Corporation Act, is
10 amended by adding a new Section E to read as follows:

11 E. Unless the articles of incorporation or bylaws provide
12 otherwise, shareholders may participate in a special or an annual
13 meeting by use of any means of communication by which all
14 shareholders participating may simultaneously hear each other
15 during the meeting. A shareholder participating in a meeting by
16 this means is deemed to be present in person at the meeting.

17 SECTION 3. Part 2, Texas Business Corporation Act, is
18 amended by adding Article 2.26-1 to read as follows:

19 2.26-1. Notice by Electronic Transmission

20 A. Without limiting the manner by which notice otherwise may
21 be given effectively to shareholders, any notice to shareholders
22 given by the corporation, under any provision of this Act, the
23 articles of incorporation or the bylaws, shall be effective if
24 given by a form of electronic transmission consented to by the
25 shareholder to whom the notice is given. Any such consent shall be
26 revocable by the shareholder by written notice to the corporation.
27 Any such consent shall be deemed revoked if (i) the corporation is

1 unable to deliver by electronic transmission two consecutive
2 notices given by the corporation in accordance with such consent
3 and (ii) such inability becomes known to the secretary or an
4 assistant secretary of the corporation or to the transfer agent, or
5 other person responsible for the giving of notice; provided,
6 however, the inadvertent failure to treat such inability as a
7 revocation shall not invalidate any meeting or other action.
8 Notice given pursuant to this subsection shall be deemed given: (a)
9 if by facsimile telecommunication, when directed to a number at
10 which the shareholder has consented to receive notice; (b) if by
11 electronic mail, when directed to an electronic mail address at
12 which the shareholder has consented to receive notice; (c) if by a
13 posting on an electronic network together with separate notice to
14 the shareholder of such specific posting when such notice is
15 directed to the record address of the shareholder or to such other
16 address at which the shareholder has consented to receive notice,
17 upon the later of such posting or the giving of such separate
18 notice; and (d) if by any other form of electronic transmission,
19 when consented to by the shareholder. An affidavit of the secretary
20 or an assistant secretary or of the transfer agent or other agent of
21 the corporation that the notice has been given by a form of
22 electronic transmission shall, in the absence of fraud, be prima
23 facie evidence of the facts therein.

24 SECTION 4. Part Two, Texas Business Corporation Act is
25 amended by adding Article 2.29-1 to read as follows:

26 2.29-1 Electronic Voting Alternative

27 A. If authorized by the corporation's board of directors,

1 any shareholder vote to be taken by written ballot may be satisfied
2 by a ballot submitted by electronic transmission by the shareholder
3 or the shareholder's proxy, provided that any such electronic
4 transmission shall either set forth or be submitted with
5 information from which it can determined that the electronic
6 transmission was authorized by the shareholder or the shareholder's
7 proxy.

8 SECTION 5. Article 2.37, Texas Business Corporation Act is
9 amended by adding Subsection C. as follows:

10 C. Notwithstanding any provisions of this Act to the
11 contrary, a notice of the date, time, place or purpose of a regular
12 or special meeting of the board of directors may be given by a form
13 of electronic transmission consented to by the director to whom the
14 notice is given. Any such consent of a director shall be revocable
15 by the director by written notice to the corporation. Any such
16 consent shall be deemed revoked if (i) the corporation is unable to
17 deliver by electronic transmission two consecutive notices given by
18 the corporation in accordance with such consent and (ii) such
19 inability becomes known to the secretary or other person
20 responsible for the giving of notice; provided, however, the
21 inadvertent failure to treat such inability as a revocation shall
22 not invalidate any meeting or other action. Notice given by
23 electronic transmission shall be deemed given: (a) if by facsimile
24 telecommunication, when directed to a number at which the director
25 has consented to receive notice (b) if by electronic mail, when
26 directed to an electronic mail address at which the director has
27 consented to receive notice; (c) if by a posting on an electronic

1 network together with separate notice to the director of such
2 specific posting when such notice is directed to an address at which
3 the director has consented to receive notice, upon the later of such
4 posting or the giving of such separate notice; and (d) if by any
5 other form of electronic transmission when consented to by the
6 director. An affidavit of the secretary or other agent of the
7 corporation that the notice has been given by a form of electronic
8 transmission shall, in the absence of fraud, be prima facie
9 evidence of the facts stated therein.

10 SECTION 6. This Act takes effect immediately if it receives
11 a vote of two-thirds of all the members elected to each house, as
12 provided by Section 39, Article III, Texas Constitution. If this
13 Act does not receive the vote necessary for immediate effect, this
14 Act takes effect September 1, 2003.