

BILL ANALYSIS

H.B. 1319
By: Giddings
Business & Industry
Committee Report (Unamended)

BACKGROUND AND PURPOSE

The Business Organizations Code (the “Code”) was adopted by the 2003 Texas Legislature through the passage of House Bill 1156. The Code was 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 assisted in the editing and drafting of the Code.

The Code codified the provisions of prior law 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 effective date of the Code was 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 Code generally will not apply prior to January 1, 2010 to an entity that existed on January 1, 2006, unless the entity expressly elects to adopt the Code as its governing statute. On the other hand, new entities formed after January 1, 2006 will be governed by the Code, in lieu of prior law.

As proposed, HB. 1319 makes technical amendments to the Code that (1) incorporate into the Code changes that were made to the prior source laws by House Bills 1165, 1637 and 3213 and Senate Bill 280, which were also adopted by the 2003 Texas Legislature and which made substantive changes to the prior laws so that they are no longer consistent with the Code, (2) correct errors in the Code, (3) reflect the actual effective date of the Code, (4) simplify filing procedures for certain types of transactions, (5) clarify certain provisions of the Code, (6) correct inconsistent provisions of the Code, (7) fill gaps in coverage of certain provisions of the Code, and (8) clarify the transition rules for application of the Code’s provisions versus the provisions of prior law.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, department, agency or institution.

ANALYSIS

Section 1 codifies the change made to the TBCA Article 1.02.A. by H.B. 1165 Section 1, which added a Subdivision (20-a) to Section 1.002 of the Code containing a definition of “electronic transmission.” It also clarifies Section 1.002(29) of the Code containing the definition of “foreign filing entity” to exclude foreign limited liability partnerships, which are considered to be foreign nonfiling entities for purposes of the Code even though they are required to register with the Secretary of State under chapter 152. This change corrects the prior inconsistent treatment under the Code of domestic limited liability partnerships as nonfiling entities and foreign limited liability partnerships as foreign filing entities. Section 1 also clarifies Section 1.002 (34) containing the definition of “general partnership” to provide that such term includes a general partnership registered as a limited liability partnership. Section 1 also corrects Section 1.002(50) of the Code containing the definition of “limited partnership” to require at

least one general partner and at least one limited partner and clarifies the second sentence of that definition in relation to limited liability limited partnerships. Finally, Section 1.002(89) of the Code containing the definitions of the words “writing” and “written” is amended by adding a reference to the new defined term “electronic transmissions.”

Section 2 revises Section 1.006 of the Code to add additional synonymous terms from prior law that have different names in the Code.

Section 3 clarifies Section 1.007 of the Code by expanding the ways in which a writing can be signed by a person to include situations in which a writing “bears” or “incorporates” a person’s signature in this manner. Electronic signatures appended to an electronic message would be considered “signed” for purposes of the Code.

Section 4 clarifies Section 2.010 of the Code to indicate that a nonprofit corporation may not be organized or registered under the Code to engage in water supply or sewer service except as an entity incorporated under Chapter 67, Water Code. A water supply or sewer service corporations formed under the Water Code will be governed by the Code as a result of Subchapter A, Chapter 23 of the Code, but only to the extent that the Code is not inconsistent with Chapter 67, Water Code.

Section 5 amends Section 2.101 of the Code to codify the additions made to TBCA Article 2.02.A. by H.B. 1165 Section 2 of the 2003 Legislature.

Section 6 amends Section 3.051(b) of the Code to codify the additions made to TBCA Article 4.01.A. by H.B. 1165 Section 21 of the 2003 Legislature.

Section 7 amends Section 3.054 of the Code to codify the additions made to TBCA Article 4.04.B. by H.B. 1165 Section 23 of the 2003 Legislature.

Section 8 amends Section 3.151(b) of the Code to codify the additions made to TBCA Article 2.44.A. by H.B. 1165 Section 19 of the 2003 Legislature.

Section 9 amends Section 4.002(a)(2) of the Code to delete the reference to “electronic” because that reference is redundant with the word “written,” as that term is defined.

Section 10 corrects Section 4.152 of the Code by changing the reference from “certificate of winding up and termination” to “certificate of termination” in Subdivision (9).

Section 11 corrects Section 4.153 of the Code to change the reference from “certificate of dissolution” to “certificate of termination” in Subdivision (5).

Section 12 corrects Section 4.155 of the Code to change the reference from “certificate of winding up and termination” to “certificate of termination” in Subdivision (6).

Section 13 adds new Section 4.161 to the Code to correct an omission. The new section provides for filing fees for cooperative associations.

Section 14 corrects an error in Section 5.063(b) of the Code.

Section 15 adds new Section 5.1041 to the Code to fill a gap in coverage of the Code. The new section states that the Secretary of State may not impose a fee for the filing of a written notice of withdrawal of a name reservation.

Section 16 amends Section 6.051(a) of the Code to codify a portion of the changes made by H.B. 1165 Section 11 to TBCA Article 2.25.A. The revisions relate to meetings using a conference telephone or other communications system authorized by Section 6.002 of the Code.

Section 17 clarifies Section 6.052 of the Code by amending Subsection (b) to specifically cover attendance at a meeting. New Subsection (c) is added to codify changes made by H.B. 1165 Section 37 to TBCA Article 9.09. Such revision clarifies the contents of a written waiver of notice of a meeting.

Section 18 adds new Section 6.205 to the Code to codify the change made by H.B. 1165 Section 38 to TBCA Article 9.10.A(4). The new section relates to use of reproductions of written consents.

Section 19 corrects the heading of Subchapter G, Chapter 6 of the Code.

Section 20 amends Section 8.001 to correct the definitions of “delegate” and “representative.”

Section 21 corrects Section 8.051 of the Code relating to mandatory indemnification to add appropriate references to delegates and former governing persons.

Section 22 amends Section 8.103(a) of the Code to codify the changes made by H.B. 1165 Section 3 to TBCA Article 2.02-1.F. The revisions revise the required vote for an indemnification determination.

Section 23 corrects the heading of Section 8.104 of the Code.

Section 24 amends Section 8.104 of the Code to codify a portion of the changes made by H.B. 1165 Section 3 to TBCA Article 2.02-1.K.

Section 25 amends Section 8.105 of the Code to codify changes made by H.B. 1165 Section 3 to Sections K and O to TBCA Article 2.02-1. In addition, a correction eliminates an erroneous cross-reference to Section 8.004.

Section 26 clarifies an ambiguity in Section 9.007 of the Code by adding specific requirements for application for registration of a foreign limited liability partnership. These provisions are made necessary by the change in the definition of “foreign filing entities” to exclude foreign limited liability partnerships. New Subsection (c) cross-references to Subchapter K, Chapter 152 to govern the registration of a foreign limited liability partnership to transact business in Texas.

Section 27 amends Section 9.008 of the Code to exclude foreign limited liability partnerships from its provisions. The new Subsection (c) cross-references to Subchapter K, Chapter 152 of the Code for the provisions governing the effect of registration of a foreign limited liability partnership to transact business in Texas.

Section 28 amends Section 9.009 of the Code to simplify the filing procedures and reduce the number of documents that may be filed by a foreign filing entity that undertakes a conversion or a merger transaction.

Section 29 corrects Section 9.010 of the Code to change references from “foreign entity” to “foreign filing entity.”

Section 30 amends Section 9.011 of the Code to add references to foreign limited liability partnership that parallel existing references to a “foreign filing entity.” This change is necessitated by the amendment of the definition of “foreign filing entity” to exclude foreign limited liability partnerships.

Section 31 adds new Section 9.162 to the Code to clarify that Subchapter D applies to foreign limited liability partnerships that register to do business in Texas.

Section 32 corrects Section 9.204 of the Code to change references from “foreign filing entity” to “foreign entity.”

Section 33 amends Section 10.005 of the Code to codify changes made by H.B. 1165 Section 29 to TBCA Article 5.03.H and to make further corrections and clarifications. Section 10.005 relates to a special kind of merger by which a holding company is created without requiring the approval of the owners of the existing domestic entity.

Section 34 amends Section 10.006(i) of the Code to codify the change made by H.B. 1165 Section 32 to TBCA Article 5.16.A. The change further limits the applicability of the “short form” merger provisions of the Code.

Section 35 corrects Section 10.008(a)(8) of the Code to make the same change made by H.B. 1165 Section 30 to TBCA Article 5.06.A.

Section 36 corrects an error in Section 10.107(c) of the Code.

Sections 37 and 38 amend Section 10.202 and adds a new section 10.203 to the Code to clarify the manner of abandonment of a merger, interest exchange or conversion when no filing is required.

Section 39 amends Section 10.354(b) of the Code to make the changes effected by H.B. 1165 Section 31 to TBCA Article 5.11.B relating to depository receipts in respect of ownership interests.

Section 40 adds new Section 11.153 to the Code to codify the additions made by H.B. 1165 Sections 34 and 43 to TBCA Article 6.08 and TNPCA Article 6.07 relating to court-ordered revocation of fraudulent terminations of entities.

Section 41 amends Section 11.315 of the Code to clarify that a court-ordered decree terminating the existence of a filing entity must be filed in accordance with Chapter 4 of the Code.

Section 42 adds new Section 11.414 to clarify that an involuntary termination decree terminating the existence of a filing entity must be filed in accordance with Chapter 4.

Section 43 amends Section 21.052 of the Code to codify the change made by H.B. 1165 Section 22 to TBCA Article 4.02.A relating to abandonment of a proposed amendment to the certificate of formation without further action by the shareholders.

Section 44 amends Section 21.053 of the Code to codify the changes made by H.B. 1165 Section 22 to TBCA Article 4.02.A allowing for amendment of the terms of a series of shares without shareholder approval in certain circumstances.

Section 45 amends Section 21.168(c) of the Code to codify the change made by H.B. 1165 Section 7 to TBCA Article 2.14-1.C permitting formulas to be used in rights or options to determine the consideration for the issuance of shares.

Section 46 amends Section 21.169 of the Code to codify the changes made by H.B. 1165 Section 7 to TBCA Article 2.14-1.F. These changes authorize the board of directors to delegate authority to issue rights and options.

Section 47 updates Section 21.208 of the Code to reflect the effective date of H.B. 1165.

Section 48 amends Section 21.210(a) of the Code to codify the change made by H.B. 1165 Section 8 to TBCA Article 2.22.B specifically authorizing restrictions on transfer based on the amount of securities owned by a person.

Section 49 amends Section 21.211 of the Code to codify the changes made by H.B. 1165 Section 8 to TBCA Article 2.22.D and H. These changes specifically authorize certain types of restrictions on transfer of securities.

Section 50 corrects the heading to Subchapter H, Chapter 21 of the Code.

Section 51 amends Section 21.353 of the Code to codify the changes made by H.B. 1165 Section 12 to TBCA Article 2.27.C relating to notices of meetings held by means of remote communication.

Section 52 adds new Section 21.3531 to the Code to adopt the changes made by H.B. 1165 Section 13 as reflected in TBCA Article 2.25-1. The changes specifically provide for notice by electronic transmission for shareholder meetings and the requirements for such notice.

Section 53 amends Section 21.354 of the Code to codify a portion of the changes made by H.B. 1165 Section 12 to TBCA Article 2.27.A. The change relates to the shareholder list requirements for a shareholders meeting held by means of remote communication.

Section 54 amends Section 21.362 to reflect the effective date of H.B. 1165.

Section 55 amends Section 21.372 to codify a portion of the changes made by H.B. 1165 Section 12 to TBCA Article 2.27.A. The change relates to making a shareholders list available on a reasonably accessible electronic network if a shareholders meeting is held by means of remote communication.

Section 56 amends Section 21.407 to clarify that a director can resign or be removed from office. The revised language cross-references to other provisions in the subchapter that provide for the resignation or removal of the directors. H.B. 1165 Section 15 makes a change to TBCA Article 2.32.A and B, but in different language.

Section 57 amends Section 21.409(a) to codify a portion of the changes made to TBCA Article 2.32.C to clarify that a majority of the outstanding voting shares is required to remove a director in lieu of the prior language which referred to a “specified portion but not less than the majority” of the outstanding voting shares.

Section 58 adds new Section 21.4091 to the Code to adopt a portion of the changes made by H.B. 1165 Section 15 to TBCA Article 2.32.A. The changes authorize a director to resign at any time by providing written notice to the corporation.

Section 59 amends Section 21.411 of the Code to codify the changes made by H.B. 1165 Section 17 to TBCA Article 2.37.C. The changes specifically provide for notice by electronic transmission for director meetings and the requirements for such notice.

Section 60 amends Sections 21.416(a) and (b) of the Code to codify the changes made by H.B. 1165 Section 16 to TBCA Article 2.36.A. The changes relate to the designation of committees by the board of directors.

Section 61 amends Section 21.452 to codify the changes made by H.B. 1165 Sections 28 and 29 to TBCA Articles 5.02.C and 5.03.C. These changes permit a board of directors to submit a plan of merger to the shareholders with the recommendation not to approve the plan and authorize a plan of merger to include a provision requiring that it be submitted to the shareholders regardless of whether the board of directors changes its recommendation to approve the plan of merger.

Section 62 amends Section 21.454 of the Code to codify the changes made by H.B. 1165 Sections 28 and 29 to TBCA Articles 5.02.C and 5.03.C with respect to a plan of exchange. These changes permit the board of directors to submit to the shareholders a plan of exchange with the recommendation that the shareholders not approve it and authorize a provision in the plan of exchange that requires the submission of it to the shareholders regardless of whether the board of directors changes its recommendation to approve the plan of exchange.

Section 63 amends Section 21.552 of the Code to adopt the changes made by H.B. 1165 Section 29 as reflected in new TBCA Article 5.03.M. The change clarifies that a shareholder has standing to institute or maintain a derivative proceeding after a merger is completed.

Section 64 amends Section 21.604 to reflect the change made by H.B. 1165 Section 40 to TBCA Article 13.02.A(4). The change corrects language to read “voting shares” instead of “common stock.”

Section 65 amends Section 21.654 of the Code to codify a portion of the changes made by H.B. 1165 Section 15 to TBCA Article 2.32.B. The change clarifies that a director may resign in addition to being removed as a director.

Section 66 amends Section 22.104(a) and (c) of the Code to make corrections by changing “incorporators” to “organizers.”

Section 67 adds a new Section 22.109 to the Code to fill a gap in coverage of the Code. The new section specifies how a nonprofit corporation may adopt a restated certificate of formation.

Section 68 amends Section 22.208(a) of the Code to clarify that a director may resign or be removed. The change parallels a similar change made by H.B. 1165 Section 15 to TBCA Article 2.32.B.

Section 69 adds new Section 22.2111 to the Code that authorizes the resignation of a director by providing written notice to the corporation. The change parallels a similar change made by H.B. 1165 Section 15 to TBCA Article 2.32.A.

Section 70 amends Section 22.355 of the Code. The deletion of subsection (7) containing references to certain organizations codifies a change made by H.B. 1165 Section 42 to TNPCA Article 2.23A.E. The changes made to subdivision (3) of Section 22.355 are based on changes made by S.B. 280 to TNPCA Article 2.23A.E. Those changes clarify the references to private or independent institutions of higher education and other educational institutions that are exempt from certain reporting requirements.

Section 71 amends Section 101.102 of the Code to codify changes made by H.B. 1637 Section 2 to TLLCA Section 4.01.B-2(2). The changes permit a person to be admitted to a limited liability company as a member without acquiring a membership interest in the company.

Section 72 amends Section 101.103 of the Code to codify the changes made by H.B. 1637 Section 2 to TLLCA Article 4.01.A and B. The changes permit a person to be admitted as a member of a limited liability company without acquiring a membership interest.

Section 73 amends Section 101.201 of the Code to codify the changes made by H.B. 1637 Section 3 to TLLCA Article 5.02-1.A. The changes provide that profits and losses of a limited liability company will be allocated to the members on the basis of the agreed values of their contributions unless the company agreement provides otherwise.

Section 74 amends Section 101.356 of the Code to fill a gap in coverage of the Code. The changes specify how a restated certificate of formation of a limited liability company must be approved.

Section 75 adds new Section 101.359 to the Code to adopt the changes made by H.B. 1637 Section 1 that were made by adding new Section C-1 to TLLCA Article 2.23. The new provisions specify how members or managers of a limited liability company may take actions at a meeting or without a meeting.

Section 76 amends Section 151.001 of the Code to correct an omission in the Code. The correction adds a definition of “distribution” that should have been in the original Code when adopted, but was omitted through an oversight.

Section 77 amends Section 152.204(a) of the Code to codify the change made by H.B. 1637 Section 20 to TRPA Section 4.04(a). The change clarifies that a transferee of a deceased partner’s partnership interest can be the recipient of duties owed by partners in the partnership.

Section 78 amends Section 152.501(b) of the Code to codify changes made by H.B. 1637 Section 21 to TRPA Section 6.01(b) relating to expulsion of a partner by judicial decree.

Section 79 amends Section 152.904 of the Code to clarify what Subchapters of Chapter 5 apply to foreign limited liability partnerships, as a result of the exclusion from the definition of “foreign filing entities” of foreign limited liability partnerships.

Section 80 amends Section 152.906 of the Code to correct the references from “cancellation” of a registration of a limited liability partnership to a “withdrawal” of the registration.

Section 81 amends Section 152.907 of the Code to correct the references from “cancellation” to “withdrawal” of the registration of a foreign limited liability partnership.

Section 82 amends Section 152.910(a) of the Code to clarify that a foreign limited liability partnership transacting business in Texas is subject to Subchapter B, Chapter 9 to the same extent as a foreign filing entity.

Section 83 amends Section 152.911(a) of the Code to clarify that all documents filed under this subchapter may be amended in the manner specified.

Section 84 adds a new Section 152.914 to the Code to provide a procedure for revocation of registration of a foreign limited liability partnership by the Secretary of State. This provision is required as a result of foreign limited liability partnerships being excluded from the definition of the term “foreign filing entities.”

Section 85 corrects Section 153.052(b) of the Code to change the phrase “certificate of cancellation” to “certificate of termination.”

Section 86 adds a new Section 153.053 to the Code to fill a gap in coverage of the Code. The changes specify how a restated certificate of formation of a limited partnership must be approved.

Section 87 amends the heading to Section 153.151 of the Code in the same manner as the heading to TRLPA Section 4.01 was amended by H.B. 1637 Section 17.

Section 88 amends Section 153.151 of the Code to codify the changes made by H.B. 1637 Section 17 to TRLPA Section 4.01. The changes relate to admission of a general partner to a limited partnership without making any contribution to the limited partnership or assuming an obligation to make a contribution, or without otherwise acquiring a partnership interest in the limited partnership.

Section 89 amends Section 153.201 of the Code to codify the change made by H.B. 1637 Section 18 to TRLPA Section 5.01. The change clarifies that the provisions governing the form of contributions apply to both general and limited partners.

Sections 90 through 95 correct various references from “certificate of cancellation” to “certificate of termination” contained in Sections 153.451, 153.452, 153.501(d), 153.503(a) and 153.553(a) of the Code.

Section 96 adds a new Section 251.054 to the Code to fill a gap in coverage of the Code. The new section specifies how a restated certificate of formation of a cooperative association may be adopted.

Section 97 amends Section 301.003(2) of the Code to codify the change made by H.B. 3213 Section 1 to TPAA Article 2(A). The change adds veterinarians to the types of professionals who may form professional associations.

Section 98 amends Section 301.006(d) of the Code to codify the changes made by H.B. 1637 Section 11 to TLLCA Article 11.04.B. The changes revise language concerning nurses and nonprofessional employees.

Section 99 amends Section 302.003(a) of the Code to correct errors.

Section 100 amends Section 402.001 of the Code to clarify how a foreign limited liability partnership should be treated during the transition period as a result of the exclusion of foreign limited liability partnerships from the term “foreign filing entities.” Notwithstanding the general rules regarding transition effective dates for the Code, Section 152.802 and 152.803, instead of prior law, will govern a renewal of registration and other filing with the Secretary of State on behalf of a domestic limited liability partnership registered under prior law. In addition, a domestic partnership that files an initial application for registration as a limited liability partnership after the effective date of the Code will be governed by Subchapter J, Chapter 152 of the Code. Foreign limited liability partnerships registered as such under prior law will continue to be governed by prior law until the expiration of the current term of registration, at which time they will become governed by Subchapter K, Chapter 152 as it applies to their registration.

Section 101 corrects the heading to Section 402.004 to reflect the substance of that Section.

Section 102 amends Section 402.005 to clarify the application of the Code to corporations created under special statutes of this state outside the Code.

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Section 103 corrects Section 402.006 to delete language that should have been deleted when the provisions of Subchapter E, Chapter 3 governing certificated ownership interests were made no longer automatically applicable to ownership interests of partnerships during the drafting process of the Code.

Section 104 clarifies the language of Section 402.007 of the Code relating to transition rules for indemnification provisions.

Section 105 amends Section 402.013 of the Code to clarify the language relating to transition rules for entities whose certificate of formation or equivalent governing document have been cancelled, revoked, involuntarily dissolved, suspended or forfeited under prior law and what law governs their reinstatement after the effective date of the Code.

Section 106 repeals Section 9.005 of the Code to codify the changes made by H.B. 1165 Section 35 to TBCA Article 8.05.A. Section 9.005 contains provisions that were required to be included by a corporation in the application for registration to transact business in Texas.

Section 107 provides that the effective date of the bill is January 1, 2006, which is the same as the effective date of the Code.

EFFECTIVE DATE

January 1, 2006.