

## **BILL ANALYSIS**

C.S.H.B. 1737  
By: Giddings  
Business & Industry  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

The Business Organizations Code (the "Code") was adopted by the 2003 Texas Legislature. 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 2005 Texas Legislature passed House Bill 1156 containing numerous technical amendments to 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, and the Code applies to domestic entities formed after that date. 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.

C.S.H.B. 1737 makes both technical and substantive amendments to the Code. The technical amendments (1) correct errors in the Code, (2) clarify certain provisions of the Code, (3) fill gaps in coverage of certain provisions of the Code, (4) clarify the transition rules for electing to be governed by the Code's provisions versus the provisions of prior law, (5) eliminate certain redundant or antiquated provisions, and (6) conform the language of the Code to the language of its source statutes in certain instances where the Code's language unintentionally deviated.

Substantive amendments that would be effected by this Bill include the following, with the affected section of the Bill in parenthetical: (a) enhanced flexibility for partnerships by creating new rights to cancel events requiring winding up when there are no limited partners, when all or substantially all assets have been sold and upon a request of a partner; (b) enhanced flexibility for nonprofit corporations by eliminating strict requirements for delivery of non-unanimous consents of directors and for setting a new record date for adjournment of a meeting of members; (c) additional logical information requirements for certificates of merger, conversion and exchange; (d) elimination of an outmoded statement required for a certificate of formation of a professional association; (e) addition of express authority for corporate director resignations that are irrevocable or take effect on a later date or specified event; and (f) enhanced flexibility for limited liability companies by creating a new right to cancel an event requiring winding up arising from the termination of membership of a company's last remaining member.

### **RULEMAKING AUTHORITY**

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

### **ANALYSIS**

C.S.H.B. 1737 amends the Business Organizations Code ("Code") as follows:

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C.S.H.B. 1737 redefines "jurisdiction of formation" and "guaranty." The bill defines "period of duration," "person," and "event requiring winding up." The bill adds synonymous terms and clarifies that synonymous terms can be contained in the governing documents of the entity in addition to being contained in the provisions of another Texas statute or code. The bill connects the statutory terms and phrases "articles of dissolution," "incorporator," "certificate of authority to transact business," "regulations," and "business corporation" to their corresponding terms or phrases in the Code.

C.S.H.B. 1737 adds references to additional chapters with respect to the definitions of "Texas Limited Partnership Law," "Texas Real Estate Investment Trust Law," and "Texas Cooperative Association Law." The bill moves the restrictions on obtaining a license to engage in a business or activity from the general prohibited purposes applicable to all domestic entities to the prohibitions for nonprofit and for-profit corporations. The bill clarifies that cemetery organizations can be operated by domestic entities formed under the Code to the extent authorized by the Health and Safety Code.

C.S.H.B. 1737 deletes the provision that authorizes a domestic entity to lend money, invest its funds, and receive and hold property as security for repayment only if the loan or assistance may reasonably be expected to benefit, directly or indirectly, the entity. The bill authorizes the domestic entity to lend money to, and otherwise assist, its managerial officials, owners, members, or employees as necessary or appropriate if the loan or assistance reasonably may be expected to benefit, directly or indirectly, the entity. The bill clarifies that only a specific period of duration of the filing entity, and none of the other reasons for which the entity may be required to wind up, must be listed in the certificate of formation. The bill clarifies that professional corporations must also contain in their certificates of formation the supplemental provisions that are required for for-profit corporations. The bill adds additional requirements for the contents of a certificate of formation of a professional association and requires a certificate of formation of a professional association providing for shares to include information regarding shares.

C.S.H.B. 1737 sets forth supplemental provisions pertaining to a restated certificate of formation for a limited liability company. The bill clarifies that the name of a limited liability partnership is required to contain the phrase "limited liability partnership" or an abbreviation, and that the name of a limited liability limited partnership is required to contain the phrase "limited liability limited partnership" or an abbreviation.

C.S.H.B. 1737 clarifies that the name of a foreign cooperative association is required to meet the same name requirements as a domestic cooperative association. The bill requires the name of a foreign professional association to meet the same name requirements as a domestic professional association. The bill requires the name of a foreign professional limited liability company to meet the same name requirements as a domestic professional limited liability company. The bill prohibits the name of a foreign professional entity to be contrary to a Texas statute or regulation that governs a person who provides professional service through a professional entity or foreign professional entity. The bill permits any organization registered or authorized to do business in the state to act as a registered agent of a domestic entity.

C.S.H.B. 1737 clarifies the heading to Chapter 6 of the Code pertaining to meeting and voting to indicate that the chapter applies only to domestic entities. The bill provides that notice of a meeting is considered to be given when the facsimile or electronic message is transmitted to a facsimile number or an electronic message address provided by the person, or to which the person consents, for the purpose of receiving notice. The bill deletes the provision in which a notice is considered to be delivered when the facsimile or electronic message is successfully transmitted. The bill authorizes an administrator, executor, guardian, or conservator of an estate who holds an ownership interest as part of the estate to vote the interest in person or by proxy without transferring the interest into the person's name. The bill clarifies that notice is not required to be given to take an action by written consent when advance notice would otherwise be required for the action to be taken at a formal meeting of owners, members, or governing persons.

C.S.H.B. 1737 authorizes limited partners, by a vote of a majority-in-interest, to make a determination approving an indemnification or advancement of expenses. The bill authorizes a

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required report of an indemnification to occur with or before the next submission to the owners or members of a consent of action without a meeting.

C.S.H.B. 1737 clarifies that the late filing fee is not payable by a foreign filing entity during a 90 day grace period after commencement of business in Texas, and sets forth the formula for calculating the late filing fee. The bill changes the time period for failure to pay a fee in connection to a filing from 90 days to 15 days after the mailing of the notice as a basis for revocation of a foreign filing entity's application for registration. The bill authorizes a foreign business trust to engage in any business or activity permitted for a limited liability company.

C.S.H.B. 1737 includes member approval, in addition to owner approval, as not being required for holding a company formation merger. The bill requires a certificate of merger or exchange to include the organizational form of each domestic entity or non-Code organization that is party to the merger or exchange or to be created by the plan of merger. The bill sets forth provisions for what information is required on a certificate of conversion.

C.S.H.B. 1737 clarifies that the governing documents of a partnership or limited liability company that adopt the rights of dissent and appraisal are authorized to modify those rights. The bill modifies the manner of computing the fair value of an ownership interest. The bill clarifies that the rights of an owner dissenting from an action are exclusive remedies for recovery of either the value of the ownership interest or money damages to the owner with respect to the action on which the vote was taken.

C.S.H.B. 1737 makes provisions pertaining to the winding up of an entity, and the cancellation of a winding up.

C.S.H.B. 1737 authorizes the secretary of state to remove from its active records a domestic filing entity if the entity's period of duration as specified in its certificate of formation, as opposed to other governing documents of the entity, has expired.

C.S.H.B. 1737 clarifies that the list of valid transfer restrictions do not limit the general power granted to impose and enforce reasonable restrictions. The bill clarifies that each of the terms of office of the initial directors resulting from a classification of the board of directors extends until the director's successor is elected and qualified. The bill clarifies when a director's resignation takes effect, and addresses the revocability of the resignation. The bill authorizes the remaining directors that constitute less than a quorum of the board of directors to take certain actions.

C.S.H.B. 1737 eliminates the need to set a new record date for a meeting of members of a nonprofit corporation if the meeting is adjourned to a date more than 90 days after the record date, and reserves the right of the board of directors to set a new record date in its discretion.

C.S.H.B. 1737 removes the requirements that a written consent signed by less than all the directors or committee members of a nonprofit corporation is required to be delivered to a certain place or entity. The bill authorizes the bylaws to provide an action required to be taken at a meeting of the nonprofit corporation's directors is authorized to be taken by less than unanimous written consent.

C.S.H.B. 1737 requires a filing instrument of a limited liability company to be signed by an authorized officer, manager, or member of the limited liability company. The bill prohibits a waiver or modification in the company agreement of the requirement that a signed writing is a condition for an enforceable promise to make a contribution to the limited liability company.

C.S.H.B. 1737 requires additional information to be maintained in the books and records of a limited liability company. The bill deletes provisions relating to a certain kind of conversion of a limited partnership to a general partnership and vice versa.

C.S.H.B. 1737 adopts the Delaware approach to use of charging orders in connection with limited partnerships and limited liability companies, which clarifies how judgment creditors may access partner or member interests.

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C.S.H.B. 1737 clarifies that a foreign limited liability partnership is authorized to be formed in a jurisdiction other than a state. The bill specifies what approval by partners in a domestic limited partnership is needed to reinstate a limited partnership.

C.S.H.B. 1737 clarifies that the filing instruments for a limited partnership must be signed by at least one general partner, and supplies rules for all different types of certificates, including certificates of conversion or exchange.

C.S.H.B. 1737 clarifies that the practice of medicine is prohibited from being performed in a professional corporation. The bill clarifies that the restrictions on the provision of professional services only by authorized persons also apply to foreign professional entities. The bill adds a new section specifying who is required to execute a certificate of termination on behalf of a professional corporation.

C.S.H.B. 1737 clarifies that a domestic entity that is a converted entity resulting from a conversion after the effective date of the Code will be governed by the Code and not any of the source statutes. The bill clarifies the procedures for adopting the Code by a domestic entity that was in existence on January 1, 2006.

C.S.H.B. 1737 repeals Section 22.306, Business Organizations Code; Section 152.501(c), Business Organizations Code; and Subchapter J, Chapter 153, Business Organizations Code.

C.S.H.B. 1737 makes conforming and nonsubstantive changes. With respect to charging orders affecting limited partnerships and limited liability companies, the bill clarifies that the governing law for judgment creditors is based on the law in effect when the judgment was rendered.

#### **EFFECTIVE DATE**

September 1, 2007.

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

C.S.H.B. 1737 deletes authorization in Section 22.153 (a) of the Code for non-profit corporations to dispense with the holding of annual meetings.

C.S.H.B. 1737 provides for the use of charging orders in connection with limited partnerships and limited liability companies to clarify how judgment creditors may access partner or member interests.