

BILL ANALYSIS

Senate Research Center
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C.S.S.B. 1859
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Business & Commerce
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Background:

Technology Enhancements. From time to time, technology advances require updating and clarification in the Business Organizations Code. S.B. 1859 addresses this by ensuring that blockchain and other electronic data systems are authorized for business entity books, records, ownership/membership documentation, consents, and other documents and actions. It clarifies the use of electronic transmissions for certain actions.

Secretary of State (SOS) Filings. SOS's filing procedures for documenting the creation and operation of business entities within the state require modifications and updating to provide better information and accessibility to the public. S.B. 1859 ensures that recordation dates for filings, including post-filing effective dates, are effectively administered by SOS. S.B. 1859 also contains other conforming amendments to assist SOS in its repository functions for filings.

Limited Liability Companies (LLCs). LLCs have become a predominant business organization in Texas, as well as the nation. To improve the operation and administration of LLCs and their subsidiary-like entities, called Series LLCs, and to conform to modifications made in other leading business states, continual legislative modifications are needed. The bill conforms "winding up" procedures for Series LLCs to those applicable to regular LLCs. Also, an inconsistency in the terms for LLC managers is corrected. Additional transparency is addressed for LLC records.

General Partnerships. General partnerships continue as heavily used business organizations, often by default, and require general updating and sometimes change in response to judicial interpretation. S.B. 1859 addresses the enforceability of creditor judgments against general partnerships and the related liability of individual partners. Current law sets forth initial prerequisites for creditors to follow when attempting to go after individual partners for general partnership debts. There are express exceptions to following the prerequisites, which permit a faster recovery by creditors in cases of insolvency or previous acceptance of liability. The wording of the exceptions has been the subject of a recent court case. The bill reworks the exception language to provide more clarity and better uniformity in use, in conformance with the ULC's Revised Uniform Partnership Act and the Delaware Revised Uniform Partnership Act. The bill also addresses the indemnification of a withdrawn partner for partnership obligations, by confirming the general responsibility of a partnership to provide such indemnity (unless agreed otherwise or for an obligation directly incurred by the withdrawing partner).

Bill Analysis:

The proposed bill amends the Business Organizations Code. The bill authorizes the use of an electronic data system, including blockchain and distributed ledger technology, for the maintenance of books and records of a domestic entity. The Business Organizations Code is amended by adding provisions permitting the effectiveness of a filing instrument to be delayed until after the occurrence of a specified event or fact. The bill will conform the grounds by which a court can order the winding up of a series of a domestic limited liability company to those for a domestic limited liability company.

The bill will require a general partnership to indemnify a withdrawn partner whose interest is redeemed by the partnership except as to obligations incurred by the act of the withdrawn partner. The Business Organizations Code is amended to require a creditor of a general partnership to obtain a partner's agreement before being able to pursue the partner directly to satisfy a judgment against the partnership without satisfying the conditions in Section 152.306(b), Business Organizations Code.

Several technical amendments to this code make minor changes or make explicit what is implicit in existing law and include the following:

- that the term of an incumbent manager of a limited liability company can be shortened by the members;
- that a consent can be sent via electronic transmission on behalf of an owner, member, or governing person; and
- that the exceptions in Subsection 152.306(c) apply to all, and not just some, of the conditions to a creditor proceeding directly against the partners of a general partnership to satisfy a judgment against the partnership. (Original Author's/Sponsor's Statement of Intent)

C.S.S.B. 1859 amends current law relating to business entities.

RULEMAKING AUTHORITY

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

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 1.002, Business Organizations Code, by amending Subdivisions (20-a) and (81) and adding Subdivision (20-b), as follows:

(20-a) Defines "electronic data system."

(20-b) Creates this subdivision from existing text. Redefines "electronic transmission" to mean a form of communication, including communication by use of or participation in one or more electronic data systems, that:

(A)-(C) makes no changes to these paragraphs.

(81) Redefines "shareholder" or "holder of shares" to mean:

(A) the person whose name shares issued by a for-profit corporation, professional corporation, or real estate investment trust are registered in the share transfer records maintained by or on behalf of the for-profit corporation, professional corporation, or real estate investment trust; or

(B) makes no changes to this paragraph.

SECTION 2. Amends Sections 3.151(a) and (b), Business Organizations Code, as follows:

(a) Requires each filing entity to keep:

(1)–(2) makes no changes to these subdivisions;

(3) deletes text relating to its registered office or principal place of business, or at the office of its transfer agent or registrar; and

(4) makes no changes to this subdivision.

(b) Deletes text referring to the books, records, minutes, and ownership or membership records of any filing entity including those described in Subsection (a)(4). Authorizes the books, records, minutes, and ownership or membership records of any filing entity to be:

(1) creates this subdivision from existing text and makes a nonsubstantive change;
or

(2) maintained by or on behalf of the filing entity on, or by means of, an information storage device or method or one or more electronic data systems, provided that books, records, minutes, and ownership or membership records so maintained can be converted into written paper form within a reasonable time, rather than another form capable of being converted into written paper form within a reasonable time.

SECTION 3. Amends Sections 3.205(a) and (c), Business Organizations Code, as follows:

(a) Requires the owner of the ownership interest, except as provided by Subsection (c) and in accordance with Chapter 8 (Indemnification and Insurance), Business Organizations Code, after an issuance or transfer of, an uncertificated ownership interest in a domestic entity, to be notified, in writing or by electronic transmission of any information required under this subchapter to be stated on a certificate representing the ownership interest, rather than requiring a domestic entity, except as provided by Subsection (c) and in accordance with Chapter 8, Business & Commerce Code, after issuing or transferring an uncertificated ownership interest to notify the owner of the ownership in writing of any information required under this subchapter to be stated as a certificate representing the ownership interest.

(c) Provides that the owner of an uncertificated ownership interest in a domestic entity is not required to be notified, rather than a domestic entity is not required to send a notice, under Subsection (a) if:

(1)–(2) makes no changes to these subdivisions.

SECTION 4. Amends Sections 4.052, 4.053, 4.054, 4.055, and 4.056, Business Organizations Code, as follows:

Sec. 4.052. DELAYED EFFECTIVENESS OF CERTAIN FILINGS. (a) Creates this subsection from existing text and makes a nonsubstantive change.

(b) Creates this subsection from existing text. Requires the filing instrument, if the effectiveness of a filing instrument is to be delayed as permitted by this section, to take effect:

(1) at a specified date;

(2) creates this subdivision from existing text and makes a nonsubstantive change;

(3) redesignates Subdivision (2) as Subdivision (3) and makes a nonsubstantive change, on the occurrence of a specified future event or fact, including an act of any person; or

(4) after the occurrence of a future event or fact, including the act of any person, at a specified date, at a specified date and time, or after the passage of a specified period of time.

Sec. 4.053. CONDITIONS FOR DELAYED EFFECTIVENESS. (a) Makes a nonsubstantive change. Provides that the date, or the date and time, at which a filing

instrument takes effect is delayed if the instrument clearly and expressly states, in addition to any other required statement or information:

(1) the specified date, or the specified date and time, rather than the specific date and time, at which the instrument takes effect; or

(2) if the instrument takes effect on or after the occurrence of a future event or fact that may occur:

(A) makes nonsubstantive changes;

(B) when the filing instrument is to take effect if the instrument is to take effect after the occurrence of a specified future event or fact; and

(C) creates this paragraph from existing text.

(b) Provides that if the effectiveness of a filing instrument is to be delayed as permitted by Section 4.052, rather than if a filing instrument is to take effect on a specific date and time other than that provided by this code:

(1) the effective date is prohibited from being later than the 90th day after the date the instrument is signed; and

(2) the specified, rather than specific, time at which the instrument is to take effect is prohibited from being specified as "12:00 a.m." or "12:00 p.m."

Sec. 4.054. DELAYED EFFECTIVENESS ON FUTURE EVENT OR FACT. Makes a nonsubstantive change. Provides that a filing instrument that is to take effect on or after the occurrence of a future event or fact in accordance with Section 4.053(a)(2), rather than on the occurrence of a future event or fact other than the passage of time, and for which the statement required by Section 4.055 is filed within the prescribed time takes effect on:

(1) the date, or the date and time, at which the event, rather than the last specified event, or fact occurs or is waived; or

(2) the specified date, the specified date and time, or the passage of the specified period of time after the occurrence or waiver of the event or fact, rather than or the date and time at which a condition is satisfied or waived.

Sec. 4.055. STATEMENT OF EVENT OR FACT. Requires an entity that files a filing instrument that takes effect on or after the occurrence of a future event or fact in accordance with Section 4.053(a)(2), rather than other than the passage of time, to sign and file as provided by Subchapter A (General Provisions), not later than the 90th day after the date the filing instrument is filed, a statement that:

(1) makes a nonsubstantive change;

(2) states the date, or the date and time, on which the condition was satisfied or waived; and

(3) if the filing instrument was to take effect after the occurrence of a specified future event or fact, states the date, or the date and time, at which the filing instrument took effect.

Sec. 4.056. FAILURE TO FILE STATEMENT. (a) Provides that, if the filing instrument is to take effect on or after the occurrence of a future event or fact in accordance with Section 4.053(a)(2), rather than the filing instrument is conditioned on the occurrence of

a future event or fact other than the passage of time, and the statement required by Section 4.055 is not filed before the expiration of the prescribed time, the filing instrument does not take effect.

(b) Requires the parties of the filing instrument, if the filing instrument is to take effect on or after the occurrence of a future event or fact, rather than if the effect of a filing instrument is conditioned on the occurrence of a future event or fact, other than the passage of time, and the specified event or fact does not occur and is not waived, to sign and file a certificate of abandonment as provided by Section 4.057 (Abandonment Before Effectiveness).

SECTION 5. Amends Section 4.057(e), Business Organizations Code, as follows:

(e) Prohibits the filing officer, if in the interim before a certification of abandonment is filed the name of the entity that is a party to the action or transaction becomes indistinguishable from, rather than the same as or deceptively similar to, the name of another entity already of file or reserved or registered under this code, from filing the certification of abandonment unless the entity by or for whom the certificate is filed changes its name in the manner provided by this code for that entity.

SECTION 6. Amends Section 4.059, Business Organizations Code, as follows:

Sec. 4.059. ACKNOWLEDGEMENT OF FILING WITH DELAYED EFFECTIVENESS. Requires an acknowledgement of filing issued or action taken by the secretary of state (SOS) affirming the filing of a filing instrument that has a specific delayed effective date, or a specific delayed effective date and time, to state the date, or the date and time, at which the instrument takes effect.

(b) Requires an acknowledgement of filing issued or other action taken by SOS affirming the filing of a filing instrument the effectiveness, rather than effect, of which is delayed until on or after the occurrence of any future event or fact to indicate that the effective date, or the effective date and time, of the instrument is conditioned on the occurrence of a future event or fact. Deletes existing text referring to stating that the effective date and time of the filing instrument is conditioned on a future event or fact.

SECTION 7. Amends Section 6.205(b), Business Organizations Code, as follows:

(b) Provides that except as otherwise provided by an entity's governing documents, an electronic transmission of a consent by an owner, member, or governing person to the taking of an action by the entity is considered a signed writing if the transmission contains or is accompanied by information from which it can be determined:

(1) that the electronic transmission was transmitted by or on behalf of the owner, member, or governing person; and

(2) the date on which the electronic transmission was transmitted by or on behalf of the owner, member, or governing person, rather than the date on which the author, member, or governing person transmitted the electronic transmission.

SECTION 8. Amends Section 101.302(c), Business Organizations Code, to delete an exception providing that a decrease in the number of managers is prohibited from shortening the term of an incumbent manager.

SECTION 9. Amends Section 101.501, Business Organizations Code, by adding Subsection (d) to authorize all books and records required to be maintained by a limited liability company under this section (Supplemental Records Required For Limited Liability Companies) to be maintained in any form and manner permitted under Section 3.151(b).

SECTION 10. Amends Section 101.503(a), Business Organizations Code, as follows:

(a) Provides that a limited liability company that refuses to allow a member or an assignee of a membership interest to examine and copy, on written request that complies with Section 101.502 (a) (relating to authorizing a limited liability company or an assignee of a membership interest in a limited liability company to copy or examine certain information), records or information described by that section (Right to Examine Records and Certain Other Information) is liable to the member or assignee for any cost or expense, including attorney's fees, incurred in enforcing the member's or assignee's rights under Section 101.502. Provides that the liability imposed on a limited liability company under this subsection is in addition to any other damages or remedy afforded to the member or assignee by law.

SECTION 11. Amends Section 101.621, Business Organizations Code, as follows;

Sec. 101.621. WINDING UP BY COURT ORDER. Provides that a district court in a county in which the registered office or principal place of business in this state of a domestic limited liability company is located, on application by or for a member associated with the series, has jurisdiction over the winding up and termination of a series if the court determines that:

- (1) creates this subdivision from existing text and makes a nonsubstantive change;
- (2) the economic purpose of the series is likely to be unreasonably frustrated; or
- (3) another member associated with the series has engaged in conduct relating to the series' business that makes it not reasonably practicable to carry on the business with that member.

SECTION 12. Amends Sections 152.306(b) and (c), Business Organizations Code, as follows:

(b) Authorizes a creditor, except as provided by Subsection (c), to proceed against the property of one or more partners, rather than against one or more partners or the property of the partners, to satisfy a judgment based on a claim against the partnership only if a judgment:

- (1) is obtained, rather than also obtained, against the partner; and
- (2) makes no changes to this subdivision; and

(c) Provides that Subsection (b)(2) does not prohibit a creditor from proceeding directly against the property of one or more partners if, rather than providing that Subsection (b) does not prohibit a creator from proceeding directly against one or more partners or the property of the partners without first seeking satisfaction for a partnership property if:

- (1) makes no changes to this subdivision;
- (2) the creditor and the partner or partners whose property is the subject of the proceeding brought by the creditor agreed, rather than the creditor and the partnership agreed, that the creditor is not required to comply with Subsection (b)(2), rather than Subsection (b);
- (3) a court orders otherwise, based on a finding that partnership property subject to execution in the state is clearly insufficient to satisfy the judgment or that compliance with Subsection (b)(2), rather than Subsection (b), is excessively burdensome; or
- (4) liability is imposed on the partner by law or contract independently of the person's status as a partner.

SECTION 13. Amends Section 152.606, Business Organizations Code, as follows:

Sec. 152.606. New heading: INDEMNIFICATION OF WITHDRAWN PARTNER. Requires a partnership to indemnify a withdrawn partner whose interest is redeemed against all partnership obligations, whether incurred before or after the date of withdrawal, except for an obligation incurred by an act of the withdrawn partner under Section 152.504 (Withdrawn Partner's Power to Bind Partnership), rather than requiring a partnership to indemnify a withdrawn partner against a partnership liability incurred before the date of withdrawal, except for a liability that is unknown to the partnership at the time or, incurred by an act of the withdrawn partner under Section 152.504.

(b) Deletes this subsection and text providing that, for purposes of this section, a liability is unknown to the partnership if it not known to a partner other than the withdrawn partner.

SECTION 14. Amends Sections 153.551(b) and (c), Business Organizations Code, as follows:

(b) Authorizes all books and records required to be maintained by a limited partnership under this section (Limited Partnerships) to be maintained in any form and manner permitted under Section 3.151(b), rather than requiring the limited partnership to maintain its records in written form or in another form capable of being converted to written form in a reasonable time.

(c) Requires a limited partnership to keep in its registered office in this state and make available to a partner on reasonable request the street address of its principal office in the United States in which the records required by this section are maintained or made available.

SECTION 15. Effective date: September 1, 2019.