

BILL ANALYSIS

Senate Research Center

S.B. 1971
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Business & Commerce
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Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Background

S.B. 1971 amends certain provisions of the Business Organizations Code relating to corporations. The Business Organizations Code, which was adopted by the 78th Texas Legislature, was a joint project of the Business Law Section of the State Bar of Texas and the Office of the Secretary of State. The Texas Legislative Council also assisted in the editing and drafting of the code. The Business Organizations Code became effective on January 1, 2006, with mandatory application of its provisions to existing entities as of January 1, 2010. Numerous technical and substantive amendments to the Business Organizations Code have been enacted in every regular legislative session since the Business Organizations Code's adoption.

Bill Analysis

As proposed, S.B. 1971 includes both substantive and technical amendments to the Business Organizations Code. Substantive amendments to the Business Organizations Code include the following: (1) revising provisions relating to voting agreements that are not part of a domestic entity's governing documents; (2) revising the provisions relating to a two-step tender or exchange offer-merger of a for-profit corporation to be subject to the exceptions to dissenters' rights applicable to other mergers and to conform to other recent changes in the similar Delaware provisions that served as the original basis for these provisions; (3) defining a "director" of a nonprofit corporation to exclude an honorary, ex-officio, or similar non-voting member of the board of directors; and (4) changing from mandatory to permissive the deposit of a voting agreement with the affected domestic entity.

Several technical amendments to the Business Organizations Code make minor changes or make explicit what is implicit in existing law and include the following: (1) clarifying that notices and lists of shareholders can be provided on behalf of a domestic for-profit corporation or other domestic entity by a transfer agent or by means of electronic transmission; (2) clarifying that meetings of directors and members of a nonprofit corporation can be held via conference telephone or other electronic communication system; (3) clarifying when a voting agreement is specifically enforceable against an owner or a subsequent owner of an ownership interest; (4) clarifying that the time period for sending notice of redemption by a for-profit corporation to holders of its redeemable shares can be specified in the terms of the series or class of shares; and (5) clarifying several provisions governing ratification of defective corporate acts to be similar to recent changes made in the Delaware corporate law upon which these provisions were modeled. (Original Author's/Sponsor's Statement of Intent)

S.B. 1971 amends current law relating to domestic corporations and other domestic 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 6.252, Business Organizations Code, by amending Subsections (a), (b), and (c) and adding Subsections (c-1), (c-2), (c-3), (c-4), and (g), as follows:

(a) Authorizes any number of owners of a domestic entity, or any number of owners of the domestic entity and the domestic entity itself, except as provided by this code or the governing documents, to enter into a written voting agreement that is not set forth in the domestic entity's governing documents, rather than enter into a written voting agreement, to provide the manner of voting of the ownership interests of the domestic entity.

(b) Provides that a copy of a voting agreement entered into under Subsection (a):

(1) is authorized, rather than required, to be deposited with the domestic entity at the domestic entity's principal executive office or registered office; and

(2) if deposited as provided by Subdivision (1), is subject to examination by an owner, whether in person or by the owner's agent or attorney, in the same manner as the owner is entitled to examine the books and records of the domestic entity.

(c) Establishes that a voting agreement entered into under Subsection (a) is specifically enforceable against the owner of an ownership interest that is the subject of the agreement if the owner executes the voting agreement or acknowledges in writing that the owner or the ownership interest is bound by the agreement. Deletes existing text specifying that the voting agreement is enforceable against the holder of an ownership interest that is the subject of the agreement, and any successor or transferee of the holder, if the voting agreement is noted conspicuously in a certain manner on the certificate representing the ownership interest.

(c-1) Provides that a voting agreement entered into under Subsection (a) is specifically enforceable against any subsequent owner of the ownership interest subject to the voting agreement if the subsequent owner:

(1) has notice or actual knowledge of the voting agreement at or before the time of transfer to the subsequent owner;

(2) is not a transferee for value and receives notice or obtains actual knowledge of the voting agreement; or

(3) acknowledges in writing that the subsequent owner or the ownership interest is bound by the voting agreement.

(c-2) Provides that a subsequent owner is considered to have notice of a voting agreement for purposes of Subsection (c-1)(1) if, at the time of transfer, the existence of the voting agreement is noted conspicuously on any certificate representing the ownership interest held by the transferor owner. Establishes that the notice described by this subsection is not the exclusive method by which notice of the voting agreement is authorized to be received by a subsequent owner for purposes of Subsection (c-1)(1).

(c-3) Establishes that a voting agreement that becomes specifically enforceable against a subsequent owner under Subsection (c-1)(2) is specifically enforceable from the time the subsequent owner first receives notice or obtains actual knowledge of the voting agreement.

(c-4) Establishes that a voting agreement that becomes specifically enforceable against a subsequent owner under Subsection (c-1)(3) is specifically enforceable from the time of the written acknowledgment by the subsequent owner.

(g) Provides that this section does not impair the right of the domestic entity to treat an owner of record as entitled to vote the ownership interest standing in the owner's name or to accept that owner's vote of the ownership interest.

SECTION 2. Amends Sections 10.354(b) and (c), Business Organizations Code, as follows:

(b) Prohibits an owner, notwithstanding Subsection (a) (relating to entitling the owner of an ownership interest in a domestic entity subject to dissenters' rights to certain dissent), subject to Subsection (c), from dissenting from a plan of merger or conversion in which there is a single surviving or new domestic entity or non-code organization, or from a plan of exchange, if:

(1) the ownership interest, or a depository receipt in respect of the ownership interest, held by the owner:

(A) in the case of a plan of merger, conversion, or exchange, other than a plan of merger pursuant to Section 21.459(c), is part of a class or series of ownership interests, or depository receipts in respect of ownership interests, that, on the record date set for purposes of determining which owners are entitled to vote on the plan of merger, conversion, or exchange, as appropriate, are either:

(i)-(ii) redesignates existing Paragraphs (A) and (B) as Subparagraphs (i) and (ii) and makes a nonsubstantive change; or

(B) in the case of a plan of merger pursuant to Section 21.459(c), is part of a class or series of ownership interests, or depository receipts in respect of ownership interests, that, immediately before the date the board of directors of the corporation that issued the ownership interest held, directly or indirectly, by the owner approves the plan of merger, are either:

(i) listed on a national securities exchange; or

(ii) held of record by at least 2,000 owners;

(2) makes no changes to this subdivision; and

(3) the owner is not required by the terms of the plan of merger, conversion, or exchange, as appropriate, to accept for the owner's ownership interest any consideration other than:

(A) makes no changes to this paragraph;

(B) cash instead of fractional ownership interests, or fractional depository receipts in respect of ownership interests, the owner would otherwise be entitled to receive, rather than cash instead of fractional ownership interests the owner would otherwise be entitled to receive; or

(C) any combination of the ownership interests, or fractional depository receipts in respect of ownership interests, and cash described by Paragraphs (A) and (B), rather than any combination of the ownership interests and cash described by Paragraphs (A) and (B).

(c) Requires that Subsection (b) not apply to a domestic entity that is a subsidiary with respect to a merger under Section 10.006 (Short Form Merger), rather than requiring that Subsection (b) not apply either to a domestic entity that is a subsidiary with respect to a merger under Section 10.006 or to a corporation with respect to a merger under Section 21.459(c).

SECTION 3. Amends Sections 10.355(d) and (f), Business Organizations Code, as follows:

(d) Provides that, in addition to the requirements prescribed by Subsection (c) (relating to requiring a notice required by certain subsections to include certain information), a notice required to be provided:

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

(3) under Subsection (b-1) is required to be provided:

(A) if given before the consummation of the offer described by Section 21.459(c)(2), rather than before consummation of the tender or exchange offer described by Section 21.459(c)(2), to each shareholder to whom that offer is made; or

(B) makes a conforming change to this paragraph.

(f) Provides that if the second notice is given after the later of the date on which the offer described by Section 21.459(c)(2), rather than on which the tender or exchange offer described by Section 21.459(c)(2), is consummated or the 20th day after the date notice under Subsection (b-1) (relating to requiring a corporation that effects a merger under Section 21.459(c) to notify certain shareholders with certain information and include certain information if notice is not given to shareholders until on or after the effective date of the merger) is given, then the second notice is required to be given to only those shareholders who have made a demand under Section 10.356(b)(3).

SECTION 4. Amends Section 10.356(b), Business Organizations Code, as follows:

(b) Provides that, to perfect the owner's rights of dissent and appraisal under Section 10.354, an owner:

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

(3) is required to give to the responsible organization a demand in writing that:

(A)–(D) makes no changes to these paragraphs; and

(E) is delivered to the responsible organization at its principal executive offices at a certain time. Makes a conforming change.

SECTION 5. Amends Section 21.002, Business Organizations Code, by adding Subdivision (10-a) to define "share transfer records."

SECTION 6. Amends Section 21.305(b), Business Organizations Code, to require the notice of redemption to be sent to each holder of redeemable shares being called not later than the 21st day or earlier than the 60th day before the date set for redemption, unless otherwise provided by the terms of the class or series of shares contained in the certificate of formation.

SECTION 7. Amends Sections 21.372(a) and (a-1), Business Organizations Code, as follows:

(a) Requires an alphabetical list of the shareholders entitled to vote at the meeting or at any adjournment of the meeting, not later than the 11th day before the date of each meeting of the shareholders of a corporation, to be prepared by or on behalf of the corporation. Removes the requirement that an officer or agent of the corporation who is in charge of the corporation's share transfer records prepare a certain alphabetical list.

(a-1) Replaces references to a reasonably accessible electronic network with references to a reasonably accessible electronic data system.

SECTION 8. Amends Section 21.459, Business Organizations Code, by amending Subsections (c), (d), and (e) and adding Subsection (f), as follows:

(c) Provides that this subsection applies only to a corporation that is a party to the merger and has a class or series of shares that are, rather than whose shares are, immediately before the date its board of directors approves the plan of merger, either listed on a

national securities exchange or held of record by at least 2,000 shareholders. Provides that, unless required by the corporation's certificate of formation, a plan of merger is not required to be approved by the shareholders of the corporation if:

(1) the plan of merger expressly permits or requires the merger to be effected under this subsection and provides that any merger effected under this subsection is required to be effected as soon as practicable following the consummation of the offer, rather than consummation of the offer described by Subdivision (2);

(2) an organization consummates an offer, rather than consummates a tender or exchange offer, for all of the outstanding shares of the corporation on the terms provided in the plan of merger that, absent this subsection, would be entitled to vote on the approval of the plan of merger, except that:

(A) the offer is authorized to be conditioned on the tender of a minimum number or percentage of shares of the corporation or of any class or series of shares of the corporation;

(B) the offer is authorized to exclude any excluded share, rather than exclude shares; and

(C) the organization is authorized to consummate separate offers for separate classes or series of shares of the corporation. Removes the specification that the offer is authorized to exclude shares of the corporation owned at the time of the commencement of the offer by certain entities. Deletes existing text of Paragraphs (A)-(D) and creates Paragraphs (B) and (C) from existing text.

(3) immediately following the consummation of the offer, shares that are irrevocably accepted for purchase or exchange pursuant to the consummation of the offer and that are received by the depository before the expiration of the offer, together with the shares that are otherwise owned by the consummating organization or its qualified affiliates and any rollover shares, equal at least the percentage of the shares of the corporation, and of each class or series of those shares that, absent this subsection, would be required to approve the plan of merger by, rather than shares that are irrevocably accepted for purchase or exchange pursuant to the consummation of the offer described by Subdivision (2) and that are received by the depository before the expiration of the offer in addition to the shares that are otherwise owned by the consummating organization equal at least the percentage of the shares, and of each class or series of those shares, of the corporation that, absent this subsection, would be required to approve the plan of merger by:

(A)-(B) makes no changes to these paragraphs;

(4) makes a conforming change to this subdivision; and

(5) each outstanding share, other than excluded shares, of each class or series of the corporation that is the subject of and is not irrevocably accepted for purchase or exchange in the offer, rather than each outstanding share of each class or series of the corporation that is the subject of and not irrevocably accepted for purchase or exchange in the offer described by Subdivision (2), is to be converted or exchanged in the merger into, or into the right to receive, the same amount and kind of consideration, as described by Section 10.002(a)(5) (relating to requiring a plan of merger to be in writing and include the manner and basis of converting or exchanging any of the ownership or membership interests of each organization that is a party to the merger into certain things), as to be paid or delivered for shares of such class or series of the corporation irrevocably accepted for purchase or exchange in the offer.

(d) Defines "consummates," "consummation," "consummating," "depository," and "offer" for purposes of Subsection (c), this subsection, and Sections 10.355(d)(3)(B), 10.355(f), and 10.356(b)(3)(E)(iv).

(e) Defines "excluded shares," "qualified affiliate," "received," and "rollover shares" for purposes of Subsection (c) and this subsection.

(f) Provides that, for purposes of Subsections (c) and (e), shares cease to be "received," with respect to certificated shares, if the certificate representing the shares was canceled before consummation of the offer, and, with respect to uncertificated shares, to the extent the uncertificated shares have been reduced or eliminated due to any sale of those shares before the consummation of the offer.

SECTION 9. Amends Section 21.701, Business Organizations Code, to specify that the definitions of this section apply to Subchapter P (Judicial Proceedings Relating to Close Corporation) and this subchapter (Close Corporation). Defines "close corporation," "close corporation provision," "ordinary corporation," and "shareholders' agreement."

SECTION 10. Amends Section 21.901, Business Organizations Code, by amending Subdivisions (2) and (4) and adding Subdivision (5-a), as follows:

(2) Defines "defective corporate act" as follows:

(A)-(B) makes no changes to these paragraphs;

(C) any act or transaction purportedly taken by or on behalf of the corporation that is, and at the time the act or transaction was purportedly taken would have been, within the power of a corporation to take under the corporate statute, without regard to the failure of authorization identified in Section 21.903(a)(4) (relating to requiring the board of directors to adopt resolutions stating the nature of the failure of authorization with respect to each defective corporate act to be ratified), but is void or voidable due to a failure of authorization.

(4) Defines "failure of authorization" to include the failure to authorize or effect an act or transaction in compliance with the disclosure set forth in any proxy or consent solicitation statement if and to the extent the failure would render the act of transaction void or voidable. Makes a nonsubstantive change.

(5) Defines "putative record date."

SECTION 11. Amends Sections 21.905, Business Organizations Code, as follows:

Sec. 21.905. SHAREHOLDER APPROVAL OF RATIFIED DEFECTIVE CORPORATE ACT REQUIRED; EXCEPTION. Requires each defective corporate act ratified under Section 21.903 (Ratification of Defective Corporate Act; Adoption of Resolutions) to be submitted to shareholders for approval as provided by Sections 21.906 (Notice Requirements For Ratified Defective Corporate Act Submitted For Shareholder Approval) and 21.907 (Shareholder Meeting; Quorum and Voting) unless:

(1)(A) creates this paragraph from existing text and redesignates existing Paragraphs (A) and (B) as Subparagraphs (i) and (ii); and

(B) redesignates Subdivision (2) as Paragraph (B) and makes a nonsubstantive change; or

(2) as of the record date for determining the shareholders entitled to vote on the ratification of the defective corporate act, there are no valid shares outstanding and entitled to vote on the ratification, regardless of whether as of that record date there exist any putative shares.

SECTION 12. Amends Section 21.906(a), Business Organizations Code, as follows:

(a) Requires the notice of the time, place, if any, and purpose of the meeting, if the ratification of a defective corporate act is required to be submitted to the shareholders for approval under Section 21.905, to be given at least 20 days before the date of the meeting to:

(1) makes no changes to this subdivision; and

(2) each holder of record of valid shares and putative shares, regardless of whether the shares are voting or nonvoting, other than to a holder whose identity or address cannot be ascertained from the corporation's records:

(A) creates this paragraph from existing text and makes a nonsubstantive change; or

(B) in the case of any defective corporate act that involved the establishment of a putative record date, as of that putative record date. Removes the exception that notice is not required to be given to a holder whose identity or address cannot be ascertained from the corporation's records.

SECTION 13. Amends Section 21.911(e), Business Organizations Code, as follows:

(e) Provides that, notwithstanding Subsections (a)-(d):

(1) makes no changes to this subdivision; and

(2) the notice required by this section (Notice to Shareholders Following Ratification of Defective Corporate Act) and Section 21.906(a)(2), rather than this section, for a corporation that has a class of stock listed on a national securities exchange, is authorized to be considered given if the information contained in the notice is disclosed in a document publically filed by the corporation with the Securities and Exchange Commission under Section 13, 14, or 15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m, 78n, or 78o(d)), and any rules promulgated under that Act.

SECTION 14. Amends Section 21.953(c), Business Organizations Code, to make nonsubstantive changes throughout the subsection.

SECTION 15. Amends Section 21.955(b), Business Organizations Code, to require a notice sent to any person, rather than a notice sent by a public benefit corporation, under Section 3.205 (Notice For Uncertificated Ownership Interest) to state conspicuously that the corporation is a public benefit corporation governed by this subchapter (Public Benefit Corporations).

SECTION 16. Amends Section 22.001, Business Organization Code, by adding Subdivision (3-1) to define "director."

SECTION 17. Amends Section 22.002, Business Organizations Code, as follows:

Sec. 22.002. MEETINGS BY REMOTE COMMUNICATIONS TECHNOLOGY. Authorizes a meeting of members of a corporation, the board of directors of a corporation, or any committee designated by the board of directors of a corporation to be held by means of a conference telephone or similar communications equipment, another suitable electronic communications system including videoconferencing technology or the Internet, or any combination of those means in accordance with Sections 6.002 (Alternative Forms of Meeting), rather than authorizing a meeting of the members of a corporation, the board of directors of a corporation, or any committee designated by the board of directors of a corporation, subject to the provisions of this code and the certificate of formation and bylaws of a corporation, to be held by means of a remote

electronic communications system, including videoconferencing technology or the Internet, only under certain conditions. Deletes Subdivisions (1) and (2).

SECTION 18. Amends Sections 22.210, Business Organizations Code, as follows:

Sec. 22.210. New heading: NON-DIRECTOR RIGHTS AND LIMITATIONS. Authorizes the certificate of formation or bylaws of a corporation to provide that a person who is not a director is entitled to receive notice of and to attend meetings of the board of directors. Establishes that by having those rights, the person does not have the authority, duties, or liabilities of a director and is not a governing person of the corporation. Deletes designations of subsections and all references to an individual as an ex officio member of the board.

SECTION 19. Amends Section 22.356(b), Business Organizations Code, as follows:

(b) Provides that the books and records of a corporation other than a bona fide alumni association are subject to audit at the discretion of the state auditor if:

(1) the corporation's certificate of formation, rather than the corporation's charter, specifically dedicates the corporation's activities to the benefit of a particular state agency; and

(2) a board member, officer, or employee of that state agency is a director of the corporation, rather than sits on the board of directors of the corporation in other than an ex officio capacity.

SECTION 20. Repealer: Section 6.252(d) (relating to providing that a certain voting agreement is specifically enforceable against any person, other than a transferee for value, after the time the person acquires knowledge of the existence of the agreement), Business Organizations Code.

Repealer: Section 6.252(e) (relating to providing that a certain otherwise enforceable voting agreement is not enforceable against a transferee for value without actual knowledge of the agreement at a certain time, without regard to value, if the voting agreement is not noted as required by Subsection (c)), Business Organizations Code.

SECTION 21. Effective date: September 1, 2019.