86R7984 CLG-F

By:  Martinez Fischer H.B. No. 3606

A BILL TO BE ENTITLED

AN ACT

relating to ratification of defective corporate acts of nonprofit corporations.

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

SECTION 1.  Chapter 22, Business Organizations Code, is amended by adding Subchapter J to read as follows:

SUBCHAPTER J. RATIFICATION OF DEFECTIVE CORPORATE ACTS; PROCEEDINGS

Sec. 22.501.  DEFINITIONS. In this subchapter:

(1)  "Corporate statute," with respect to an action or filing, means this code, the former Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes), or any predecessor statute of this state that governed the action or the filing.

(2)  "Defective corporate act" means:

(A)  an election or appointment of directors that is void or voidable due to a failure of authorization; or

(B)  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, but is void or voidable due to a failure of authorization.

(3)  "District court" means a district court in:

(A)  the county in which the corporation's principal office in this state is located; or

(B)  the county in which the corporation's registered office in this state is located, if the corporation does not have a principal office in this state.

(4)  "Failure of authorization" means:

(A)  the failure to authorize or effect an act or transaction in compliance with the provisions of the corporate statute, the governing documents of the corporation, a corporate resolution, or any plan or agreement to which the corporation is a party, if and to the extent the failure would render the act or transaction void or voidable; or

(B)  the failure of the board of directors or an officer of the corporation to authorize or approve an act or transaction taken by or on behalf of the corporation that required the prior authorization or approval of the board of directors or the officer.

(5)  "Time of the defective corporate act" means the date and time the defective corporate act was purported to have been taken or the approximate date and time, if the exact date is unknown.

(6)  "Validation effective time" or "effective time of the validation," with respect to any defective corporate act ratified under this subchapter, means the latest of:

(A)  the time at which the defective corporate act submitted to the members for approval under Section 22.505 is approved by the members or, if the corporation has no members or has no members with voting rights or if no member approval is required, the time at which the board of directors adopts the resolutions required by Section 22.503;

(B)  if a certificate of validation is not required to be filed under Section 22.508, the time, if any, specified by the board of directors or the members in the resolutions adopted under Section 22.503, which may not precede the time at which the resolutions are adopted; or

(C)  the time at which any certificate of validation filed under Section 22.508 takes effect in accordance with Chapter 4.

Sec. 22.502.  RATIFICATION OF DEFECTIVE CORPORATE ACT.  Subject to Section 22.509, a defective corporate act is not void or voidable solely as a result of a failure of authorization if the act is:

(1)  ratified in accordance with this subchapter; or

(2)  validated by the district court in a proceeding brought under Section 22.512.

Sec. 22.503.  RATIFICATION OF DEFECTIVE CORPORATE ACT; ADOPTION OF RESOLUTIONS.  (a)  To ratify one or more defective corporate acts, the board of directors of the corporation shall adopt resolutions stating:

(1)  the defective corporate act or acts to be ratified;

(2)  the date of each defective corporate act;

(3)  the nature of the failure of authorization with respect to each defective corporate act to be ratified; and

(4)  that the board of directors approves the ratification of the defective corporate act or acts.

(b)  If the corporation has members with voting rights, a resolution may also state that, notwithstanding member approval of the ratification of a defective corporate act that is a subject of the resolution, the board of directors may, with respect to the defective corporate act, abandon the ratification of the defective corporate act at any time before the validation effective time without further member action.

(c)  If the management of the affairs of the corporation is vested in its members under Section 22.202, the members of the corporation shall adopt resolutions stating:

(1)  the defective corporate act or acts to be ratified;

(2)  the date of each defective corporate act;

(3)  the nature of the failure of authorization with respect to each corporate act to be ratified; and

(4)  that the members approve the ratification of the defective corporate act or acts.

Sec. 22.504.  QUORUM AND VOTING REQUIREMENTS FOR ADOPTION OF RESOLUTIONS. (a) The quorum and voting requirements applicable to the adoption of the resolutions to ratify a defective corporate act under Section 22.503 are the same as the quorum and voting requirements applicable at the time of the adoption of the resolutions for the type of defective corporate act proposed to be ratified.

(b)  Notwithstanding Subsection (a) and except as provided by Subsection (c), if in order for a quorum to be present or to approve the defective corporate act, the presence or approval of a larger number or portion of the governing authority would have been required by the governing documents of the corporation, any plan or agreement to which the corporation was a party, or any provision of the corporate statute, each as in effect at the time of the defective corporate act, then the presence or approval of the larger number or portion of such governing authority must be required for a quorum to be present or to adopt the resolutions to ratify the defective corporate act, as applicable.

(c)  If the corporation has members with voting rights or if the corporation had members with voting rights at the time of the taking of the defective corporate act, the presence or approval of any director elected, appointed, or nominated by a class of members that no longer exists, or by any person that is no longer a member, shall not be required for a quorum to be present or to adopt the resolutions.

Sec. 22.505.  APPROVAL OF RATIFIED DEFECTIVE CORPORATE ACT BY MEMBERS WITH VOTING RIGHTS REQUIRED; EXCEPTION. If the corporation has members with voting rights, each defective corporate act ratified under Section 22.503(a) must be submitted to such members of the corporation for approval as provided by Sections 22.506 and 22.507, unless no other provision of the corporate statute, no provision of the corporation's governing documents, and no provision of any plan or agreement to which the corporation is a party would have required approval by such members of:

(1)  the defective corporate act to be ratified at the time of that defective corporate act; or

(2)  the type of defective corporate act to be ratified at the time the board of directors adopts the resolutions ratifying that defective corporate act under Section 22.503.

Sec. 22.506.  NOTICE REQUIREMENTS FOR RATIFIED DEFECTIVE CORPORATE ACT SUBMITTED FOR APPROVAL OF MEMBERS WITH VOTING RIGHTS. (a) If a corporation has members with voting rights and if the ratification of a defective corporate act is required to be submitted to such members for approval under Section 22.505, notice of the time, place, if any, and purpose of the meeting shall be given at least 20 days before the date of the meeting to:

(1)  each member with voting rights as of the record date of the meeting, at the address of the member as it appears or most recently appeared, as appropriate, on the corporation's records; and

(2)  each member with voting rights as of the time of the defective corporate act, except that notice is not required to be given to a member whose identity or address cannot be ascertained from the corporation's records.

(b)  The notice must contain:

(1)  copies of the resolutions adopted by the board of directors under Section 22.503 or the information required by Sections 22.503(a)(1)-(4); and

(2)  a statement that, on member approval of the ratification of the defective corporate act made in accordance with this subchapter, the member's right to challenge the defective corporate act is limited to an action claiming that a court of appropriate jurisdiction, in its discretion, should declare:

(A)  that the ratification not take effect or that it take effect only on certain conditions, if that action is filed with the court not later than the 120th day after the applicable validation effective time; or

(B)  that the ratification was not accomplished in accordance with this subchapter.

Sec. 22.507.  QUORUM AND VOTING FOR APPROVAL OF RATIFIED DEFECTIVE CORPORATE ACT AT MEETING OF MEMBERS WITH VOTING RIGHTS. (a) If the corporation has members with voting rights, at the meeting of such members, the quorum and voting requirements applicable to the approval of the ratification of a defective corporate act under Section 22.505 are the same as the quorum and voting requirements applicable at the time of the approval by the members of the ratification for the type of ratified defective corporate act proposed to be approved, except as provided by this section.

(b)  If the presence or approval of a larger number of members or of any class of members would have been required for a quorum to be present or to approve the defective corporate act, as applicable, by the corporation's governing documents, any plan or agreement to which the corporation was a party, or any provision of the corporate statute, each as in effect at the time of the defective corporate act, then the presence or approval of the larger number of members or of the class of members shall be required for a quorum to be present or to approve the ratification of the defective corporate act, as applicable, except that the presence or approval of any class that is no longer in existence or has no members, or of any person that is no longer a member with voting rights, is not required.

(c)  The approval by the members with voting rights of the ratification of the election of a director requires the affirmative vote of the majority of members present at the meeting and entitled to vote on the election of the director at the time of the approval, unless the governing documents of the corporation then in effect or in effect at the time of the defective election require or required a larger number of members with voting rights or of any class of members with voting rights to elect the director, in which case the affirmative vote of the larger number of members or of the class of members is required to ratify the election of the director, except that the presence or approval of any class that is no longer in existence or has no members, or of any person that is no longer a member with voting rights, is not required.

Sec. 22.508.  CERTIFICATE OF VALIDATION. (a) If a defective corporate act ratified under this subchapter would have required under any other provision of the corporate statute the filing of a filing instrument or other document with the filing officer, the corporation shall file a certificate of validation with respect to the defective corporate act in accordance with Chapter 4, regardless of whether a filing instrument or other document was previously filed with respect to the defective corporate act. The filing of another filing instrument or document is not required.

(b)  A separate certificate of validation is required for each defective corporate act for which a certificate of validation is required under this section, except that two or more defective corporate acts may be included in a single certificate of validation if the corporation filed, or to comply with the applicable provisions of this code could have filed, a single filing instrument or other document under another provision of this code to effect the acts.

(c)  The certificate of validation must include:

(1)  each defective corporate act that is a subject of the certificate of validation, including:

(A)  the date of the defective corporate act; and

(B)  the nature of the failure of authorization with respect to the defective corporate act;

(2)  a statement that each defective corporate act was ratified in accordance with this subchapter, including:

(A)  the date on which the board of directors ratified each defective corporate act; and

(B)  if the corporation has members with voting rights, the date, if any, on which the members approved the ratification of each defective corporate act or, if the management of the affairs of the corporation is vested in its members under Section 22.202, the date on which the members ratified each defective corporate act; and

(3)  as appropriate:

(A)  if a filing instrument was previously filed with a filing officer under the corporate statute with respect to the defective corporate act and no change to the filing instrument is required to give effect to the defective corporate act as ratified in accordance with this subchapter:

(i)  the name, title, and filing date of the previously filed filing instrument and of any certificate of correction to the filing instrument; and

(ii)  a statement that a copy of the previously filed filing instrument, together with any certificate of correction to the filing instrument, is attached as an exhibit to the certificate of validation;

(B)  if a filing instrument was previously filed with a filing officer under the corporate statute with respect to the defective corporate act and the filing instrument requires any change to give effect to the defective corporate act as ratified in accordance with this subchapter, including a change to the date and time of the effectiveness of the filing instrument:

(i)  the name, title, and filing date of the previously filed filing instrument and of any certificate of correction to the filing instrument;

(ii)  a statement that a filing instrument containing all the information required to be included under the applicable provisions of this code to give effect to the ratified defective corporate act is attached as an exhibit to the certificate of validation; and

(iii)  the date and time that the attached filing instrument is considered to have become effective under this subchapter; or

(C)  if a filing instrument was not previously filed with a filing officer under the corporate statute with respect to the defective corporate act and the defective corporate act as ratified under this subchapter would have required under the other applicable provisions of this code the filing of a filing instrument in accordance with Chapter 4, if the defective corporate act had occurred when this code was in effect:

(i)  a statement that a filing instrument containing all the information required to be included under the applicable provisions of this code to give effect to the defective corporate act, as if the defective corporate act had occurred when this code was in effect, is attached as an exhibit to the certificate of validation; and

(ii)  the date and time that the attached filing instrument is considered to have become effective under this subchapter.

(d)  A filing instrument attached to a certificate of validation under Subsection (c)(3)(B) or (C) does not need to be executed separately and does not need to include any statement required by any other provision of this code that the instrument has been approved and adopted in accordance with that provision.

Sec. 22.509.  ADOPTION OF RESOLUTIONS; EFFECT ON DEFECTIVE CORPORATE ACT.  On or after the validation effective time, unless determined otherwise in an action brought under Section 22.512, each defective corporate act ratified in accordance with this subchapter may not be considered void or voidable as a result of the failure of authorization described by the resolutions adopted under Sections 22.503 and 22.504, and the effect shall be retroactive to the time of the defective corporate act.

Sec. 22.510.  NOTICE TO MEMBERS FOLLOWING RATIFICATION OF DEFECTIVE CORPORATE ACT.  (a)  If the management of the affairs of a corporation is vested in its members under Section 22.202 or if a corporation has members with voting rights, for each defective corporate act ratified by the governing authority under Sections 22.503 and 22.504, notice of the ratification shall be given promptly to:

(1)  each member having voting rights as of the date the governing authority adopted the resolutions ratifying the defective corporate act; or

(2)  each member having voting rights as of a date not later than the 60th day after the date of adoption, as established by the governing authority.

(b)  Notice under this section shall be sent to the address of a member described by Subsection (a)(1) or (a)(2) as the address appears or most recently appeared, as appropriate, on the records of the corporation.

(c)  Notice under this section shall also be given to each member having voting rights as of the time of the defective corporate act, except that notice is not required to be given to a member whose identity or address cannot be ascertained from the corporation's records.

(d)  The notice must contain:

(1)  copies of the resolutions adopted by the governing authority under Section 22.503 or the information required by Section 22.503(a)(1)-(4) or 22.503(c)(1)-(4), as applicable; and

(2)  a statement that, on ratification of the defective corporate act made in accordance with this subchapter, the member's right to challenge the defective corporate act is limited to an action claiming that a court of appropriate jurisdiction, in its discretion, should declare:

(A)  that the ratification not take effect or that it take effect only on certain conditions, if the action is filed not later than the 120th day after the later of the applicable validation effective time or the time at which the notice required by this section is given; or

(B)  that the ratification was not accomplished in accordance with this subchapter.

(e)  Notwithstanding Subsections (a)-(d), notice is not required to be given under this section to a person if notice of the ratification of the defective corporate act is given to that person in accordance with Section 22.506.

(f)  For purposes of Sections 22.505, 22.506, and 22.507 and this section, notice to members with voting rights as of the time of the defective corporate act shall be treated as notice to such members for purposes of Sections 6.051, 6.052, 6.053, 6.201, 6.202, 6.203, 6.204, 6.205, and 22.156.

(g)  If the ratification of a defective corporate act has been approved by the members acting under Section 6.202, the notice required by this section may be included in any notice required to be given under Section 6.202(d) and, if included:

(1)  shall be sent to the members entitled to the notice under Section 6.202(d) and all other members otherwise entitled to the notice under Subsection (a); and

(2)  is not required to be sent to members who signed a consent described by Section 6.202(b).

Sec. 22.511.  RATIFICATION PROCEDURES OR COURT PROCEEDINGS CONCERNING VALIDATION NOT EXCLUSIVE. (a) Ratification of an act or transaction under this subchapter or validation of an act or transaction as provided by Sections 22.512 through 22.515 is not the exclusive means of ratifying or validating any act or transaction taken by or on behalf of the corporation, including any defective corporate act, or of adopting or endorsing any act or transaction taken by or in the name of the corporation before the corporation exists.

(b)  The absence or failure of ratification of an act or transaction in accordance with this subchapter or of validation of an act or transaction as provided by Sections 22.512 through 22.515 does not, of itself, affect the validity or effectiveness of any act or transaction properly ratified under common law or otherwise, nor does it create a presumption that any such act or transaction is or was a defective corporate act.

Sec. 22.512.  PROCEEDING REGARDING VALIDITY OF DEFECTIVE CORPORATE ACTS.  (a)  The following may bring an action under this section:

(1)  the corporation;

(2)  any successor entity to the corporation;

(3)  any member of the corporation's board of directors;

(4)  any member with voting rights;

(5)  any record member with voting rights as of the time a defective corporate act was ratified in accordance with this subchapter; or

(6)  any other person claiming to be substantially and adversely affected by a ratification under this subchapter.

(b)  Subject to Section 22.515, the district court, on application by a person described by Subsection (a), may:

(1)  determine the validity and effectiveness of any defective corporate act ratified in accordance with this subchapter;

(2)  determine the validity and effectiveness of the ratification of any defective corporate act in accordance with this subchapter;

(3)  determine the validity and effectiveness of:

(A)  any defective corporate act not ratified under this subchapter; or

(B)  any defective corporate act not ratified effectively under this subchapter;

(4)  determine the validity of any corporate act or transaction; and

(5)  modify or waive any of the procedures set forth in Sections 22.501 through 22.511 to ratify a defective corporate act.

(c)  In connection with an action brought under this section, the district court may:

(1)  declare that a ratification in accordance with and pursuant to this subchapter is not effective or that the ratification is effective only at a time or on conditions as specified by the district court;

(2)  validate and declare effective any defective corporate act and impose conditions on such a validation;

(3)  require measures to remedy or avoid harm to any person substantially and adversely affected by a ratification under this subchapter or from any order of the district court pursuant to this section, excluding any harm that would have resulted had the defective corporate act been valid when approved or effectuated;

(4)  order the filing officer to accept for filing an instrument with an effective date and time as specified by the court, which may be before or subsequent to the time of the order;

(5)  if the corporation has members with voting rights, order that a meeting of such members be held and determine the right and power of persons to vote at the meeting;

(6)  declare that a defective corporate act validated by the court is effective as of the time of the defective corporate act or at such other time as determined by the court; and

(7)  make any other order regarding such matters as the court considers appropriate under the circumstances.

(d)  In connection with the resolution of matters under Subsections (b) and (c), the district court may consider:

(1)  whether the defective corporate act was originally approved or effectuated with the belief that the approval or effectuation was in compliance with the provisions of the corporate statute or the governing documents of the corporation;

(2)  whether the corporation and the corporation's board of directors have treated the defective corporate act as a valid act or transaction and whether any person has acted in reliance on the public record that the defective corporate act was valid;

(3)  whether any person will be or was harmed by the ratification or validation of the defective corporate act, excluding any harm that would have resulted had the defective corporate act been valid when it was approved or took effect;

(4)  whether any person will be harmed by the failure to ratify or validate the defective corporate act; and

(5)  any other factors or considerations the district court considers just and equitable.

Sec. 22.513.  EXCLUSIVE JURISDICTION. The district court has exclusive jurisdiction to hear and determine any action brought under Section 22.512.

Sec. 22.514.  SERVICE.  (a) Service of an application filed under Section 22.512 on the registered agent of a corporation or in any other manner permitted by applicable law is considered to be service on the corporation, and no other party need be joined in order for the district court to adjudicate the matter.

(b)  If an action is brought by a corporation under Section 22.512, the district court may require that notice of the action be provided to other persons identified by the court and permit those other persons to intervene in the action.

Sec. 22.515.  STATUTE OF LIMITATIONS. (a) This section does not apply to:

(1)  an action asserting that a ratification was not accomplished in accordance with this subchapter; or

(2)  any person to whom notice of the ratification was not given as required by Sections 22.506 and 22.510.

(b)  Notwithstanding any other provision of this subchapter:

(1)  an action claiming that a defective corporate act is void or voidable due to a failure of authorization identified in the resolutions adopted in accordance with Section 22.503 may not be filed in or must be dismissed by any court after the applicable validation effective time; and

(2)  an action claiming that a court of appropriate jurisdiction, in its discretion, should declare that a ratification in accordance with this subchapter not take effect or that the ratification take effect only on certain conditions may not be filed with the court after the expiration of the 120th day after the later of the validation effective time or the time that any notice required to be given under Section 22.510 is given with respect to the ratification.

(c)  Except as otherwise provided by a corporation's governing documents, for purposes of this section, notice under Section 22.510 that is:

(1)  mailed is considered to be given on the date the notice is deposited in the United States mail with postage paid in an envelope addressed to the member at the member's address appearing or most recently appearing, as appropriate, in the records of the corporation; and

(2)  transmitted by facsimile or electronic message 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 member, or to which the member consents, for the purpose of receiving notice.

SECTION 2.  This Act takes effect September 1, 2019.