

## **BILL ANALYSIS**

H.B. 3364  
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Business & Industry  
Committee Report (Unamended)

### **BACKGROUND AND PURPOSE**

The State Bar of Texas and the Texas Business Law Foundation routinely suggest updates to the Business Organizations Code in order to ensure that state business law is in line with that of other states. This legislation provides several needed updates to Business Organizations Code provisions governing the creation and operation of Texas corporations, limited liability companies, partnerships, associations, and other types of business entities. H.B. 3364 seeks to ensure Texas continues to be competitive with regard to the formation and retention of business entities by providing for these crucial updates to our state's business law.

### **CRIMINAL JUSTICE IMPACT**

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

### **RULEMAKING AUTHORITY**

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

### **ANALYSIS**

H.B. 3364 amends the Business Organizations Code to revise provisions relating to business entities. The bill authorizes the governing authority of a domestic entity to take an emergency action during an emergency period without satisfying the requirements of the entity's governing documents or the Business Organizations Code that apply outside of an emergency period with respect to procedural requirements for action at a meeting of the governing persons. The bill makes such an action binding on the entity and prohibits the action from being used to impose liability on a managerial official, employee, or agent of the entity if the action is taken in good faith and based on the reasonable belief that the emergency action was in the entity's best interest. The bill makes the emergency action authorization inapplicable to an action by the governing authority to amend the entity's governing documents or an action that must be approved by a separate vote of the owners or members of the entity in accordance with the applicable requirements that apply outside of an emergency period. The bill replaces the authorization for the governing authority of a domestic entity to adopt provisions in the domestic entity's governing documents regarding the management of the entity during an emergency with an authorization to adopt provisions in the documents regarding emergency actions that include certain provisions applicable only during an emergency period. The bill defines "emergency," "emergency action," and "emergency period," among other terms.

H.B. 3364 provides for the written consent or consents authorizing the owners, members, or governing authority of a filing entity, or a committee of the governing authority, to take an action that requires unanimous or less than unanimous consent without holding a meeting, providing notice, or taking a vote to take effect at certain future times, including a time that is determined

on the happening of an event. The bill authorizes a person signing the written consent to revoke the person's consent any time before the applicable effective time of the consent. The bill requires the written consent or consents for an action that requires less than unanimous consent to include a date of signing of the latest dated consent satisfying the minimum number of owners or members necessary to approve the action that is the subject of the consent. The bill authorizes the governing documents of a domestic entity to require, consistent with applicable state and federal jurisdictional requirements, that any claim of any nature that is based on, arises from, or relates to the internal affairs of the entity be brought only in a court in Texas.

H.B. 3364 authorizes a restated certificate of formation for a for-profit corporation, professional corporation, or nonprofit corporation to omit any prior statements regarding the number of directors and the names and addresses of those directors and, at the corporation's election, to insert a statement regarding the current number of directors and the names and addresses of the directors. The bill removes the authorization for the restated certificates of formation to update the current number of directors and the names and addresses of the directors.

H.B. 3364 replaces the authorization for the certificate of formation of an enterprise to restrict the circumstances under which the enterprise must or may indemnify or may advance expenses related to indemnification and insurance to a person with an authorization for a governing document of an enterprise to restrict those circumstances. The bill removes the authorization for the written partnership agreement of a limited partnership to restrict those circumstances in that manner. The bill exempts a provision that provides for indemnification or exculpation in the governing documents of an enterprise subject to certain indemnification and insurance requirements or of a general partnership or limited liability company from a requirement under state law that indemnification or exculpation for negligence be expressly and conspicuously stated.

H.B. 3364 includes acting as a governing person of a domestic or foreign entity that is registered to transact business in Texas among the activities that do not constitute transaction of business in Texas. The bill revises statutory provisions relating to the winding up and termination of a domestic entity by doing the following:

- expanding the definition of "existing claim" to include a claim that exists after the entity's termination and before the third anniversary of the date of the entity's termination and is not barred by limitations, including a claim under a contractual or other obligation incurred after termination;
- establishing the effective date of a revocation of a fraudulent termination of an entity's existence and continuing the entity's status as if the termination of the entity's existence had never occurred;
- providing for the continuation and effect of a filing entity's reinstated certificate of formation; and
- setting out the conditions under which the extinguishment of an existing claim with respect to a terminated filing entity is nullified.

H.B. 3364 establishes that an annual or special meeting of a for-profit corporation's shareholders held by means of a telephone conference or other authorized communication system is considered to have satisfied the requirement that participating shareholders be able to communicate with all other meeting participants if the corporation implements reasonable measures to provide each shareholder entitled to vote at the meeting, or the shareholder's proxyholder, a reasonable opportunity to vote on matters submitted to the shareholders and to read or hear the proceedings of the meeting substantially concurrently with those proceedings.

H.B. 3364 changes the information stated in the certificate of formation of a limited liability company from whether the company will or will not have managers to whether the company initially has or initially does not have managers. The bill authorizes the restated certificate of formation for a limited liability company to omit any prior statements regarding whether the company has or does not have managers, the names and addresses of managers or members,

and, at the company's election, to insert a statement regarding that information. The bill establishes that, unless the company agreement provides otherwise, the company's governing authority consists of the managers or members of the company, as applicable, based on the certificate of formation.

H.B. 3364 establishes that a person who has entered into a limited partnership agreement as a general partner and who is named as a general partner in the certificate of formation of the limited partnership becomes a general partner on formation of the limited partnership. The bill sets out the financial statements, information, and valuations on which the determination of the amount of a limited partnership's or limited liability company's liabilities or the value of the partnership's or company's assets for the purposes of limitations on distributions to a partner or member may be based. The bill makes the determination inapplicable to the computation of any tax imposed on the partnership under state law and requires an action alleging such a distribution is made in violation to be commenced not later than the second anniversary of the date of the distribution. The bill removes language prohibiting a limited liability company agreement for the regulation and management of the affairs of the company from containing a provision that is inconsistent with the company's certificate of formation.

H.B. 3364 includes financial statements of a real estate investment trust that present the trust's condition in accordance with international financial reporting standards among the statements on which a determination of the trust's insolvency, net assets, stated capital, and surplus may be based. The bill establishes that those methods of determination do not apply to the computation of any tax imposed on a real estate investment trust.

H.B. 3364 repeals the following provisions of the Business Organizations Code:

- Section 3.253; and
- Section 3.254.

#### **EFFECTIVE DATE**

September 1, 2021.